Jurisdictional Statement

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In the Matter of the Adoption of Jessica Martz, a Minor under the age of fourteen years, by

JONATHAN LEHR,

Appellant,

v.

LORRAINE ROBERTSON, RICHARD N. ROBERTSON, et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK (Case No. 565)

JURISDICTIONAL STATEMENT

DAVID J. FREEMAN, ESQ.
175 Main Street
White Plains, New York 10601
(914) 949-3311
Attorney for Appellant

(12168)

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Questions Presented.

I. Can a state court, consistent with the Due Process and Equal Protection clause of the Fourteenth Amendment to the United States Constitution, construe state statutes to permit the adoption of

an illegitimate child to become final, thereby forever terminating the parental rights of said child's putative father, without requiring that notice of such adoption proceeding and the opportunity to be heard therein be given to the putative father of such adopted child, when, prior to the final order of adoption, the Court granting the adoption, as well as the natural motner and adoptive father, had actual knowledge of the following: (i) the identity of such putative father, and (ii) the whereabouts of such putative father, and (iii) the fact that such putative father had acknowledged paternity of such adoptive child and had sought visitation rights by the filing of a panity petition.

Under the foregoing circumstances, did not the State statutes as construed by the State courts deny such putative father his rights of due process and/or

equal protection under the laws as provided by the Fourteenth Amendment to the United States Constitution?

II. Supplementing the foregoing, can a state court, consistent with the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, construe those same state statutes to mean that notice of and the opportunity to be heard in such adoption proceedings shall not be given to the above described putative father, while, on the other hand, construe those same state statutes to mean that notice of and the opportunity to be heard in such adoption proceedings shall be given to other parents, including unwed mothers, wed mothers and fathers, divorced fathers and mothers, and a limited category of putative fathers, other than the putative father described above?

Does not this discriminatory treatment of Appellant violate his rights of Due Process and Equal Protection under the Fourteenth Amendment to the United States Constitution.

III. Can a State court, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, construe those same state statutes to permit a final order of adoption to be entered respecting said putative father's child, when those statutes have precluded that putative father from participating in these adoption proceedings to prove his fitness, to consent to the adoption and/or to offer evidence as to his relationship with the child and the child's best interest, while affording some or all of those rights to other parents including unwed mothers, wed fathers and mothers, divorced fathers

and mothers, and certain putative fathers other than the above described putative father.

Does not this discriminatory treatment of Appellant violate his rights of Due Process and Equal Portection under the Fourteenth Amendment to the United States Constitution.

IV. Can the Rule of Law annunciated by this Court in Caban v. Mohammed, 441 U.S. 380 (1979) be applied to the facts and circumstances of this case, either retrospectively or otherwise. If so, does not that holding render the State Statutes as construed by the courts herein to have unconstitutionally deprived the putative father herein of his Due Process and Equal Protection rights under the Fourteenth Amendment to the United States Constitution.

Parties.

Appellant: Jonathan Lehr.

Appellees: Lorraine Robertson,

Richard N. Robertson.

Intervenor Appellee: Robert Abrams as Attorney General (Intervenor Appellee) William Kelly, Westchester County Attorney)

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Opinions Below.

The opinion of the Court of Appeals of the State of New York, dated November 24, 1981, is reported at 54 N.Y. 2d 417 and is printed in Appendix A appended to this statement under separate cover.

The opinion of the Supreme Court of the State of New York, Appellate Division, Third Department, dated December 11, 1980 is reported at 77 App. Div. 2d 381 and is printed in Appendix B appended to this statement under separate cover.

The opinion of the New York State Family Court, Ulster County, dated November 26, 1979, is reported at 102 Misc. 2d 102 and is printed in Appendix C appended to this statement under separate cover.

Jurisdiction

(a) Nature of Proceedings

This is a proceeding brought by Appellant in the Family Court of Ulster

County (Court of first instance) pursuant to Section 114 of the New York Domestic Relations Law as it stood at the time, the purpose of which was to open, vacate and/or set aside a prior order of adoption dated March 7, 1980, and to inspect the sealed records of said adoption proceedings. Despite Appellant's contention that his Constitutional rights of Due Process and Equal Protection were violated, the court of first instance denied Appellant's application in its entirety and upheld the adoption. The court of first instance was thereafter upheld by the appellate courts of the State of New York, culminating in a final judgment rendered by the highest court of New York State, where the validity of a statute of New York State was drawn in question again on the ground that it was repugnant to the Constitution of the United States, and the decision was in favor of its va-

lidity.

(b) Judgment to Be Reviewed.

The judgment of the Court of Appeals of the State of New York sought to be reviewed was entered on November 24, 1981. The Notice of Appeal was filed on February 8, 1982 in the Family Court, Ulster County, and the Office of the Clerk of the Court of Appeals. On February 10, 1982, Mr. Justice Marshall signed an order extending time for filing this Jurisdictional Statement until March 22, 1982.

(c) Jurisdiction

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. 1257(2)

Constitutional Provisions, Statutes, and Regulations Involved.

Constitutional: The relevant Constitutional provision involved is the United States Constitution, Fourteenth Amendment, Section 1, which provides as fol-

lows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

State: The relevant State statutes are New York Domestic Relations Law, Section 111, (especially subdivision 3), and Section 111a (14 McKinney's Consolidated Laws of New York annotated, copyright 1977, which are set out verbatim in Appendix F. Statutes are set forth as they existed on March 7, 1979, (the date the order of adoption herein), and as amended to date.

Statement of Case.

(a) Introduction.

Appellant herein is the putative father[1] of the infant, Jessica Martz, who was born out-of-wedlock, the Appellee, Lorraine Robertson, being the natural mother. On March 7, 1979, the Ulster County Family Court signed an order of adoption by which the infant, Jessica, was adopted by the natural mother's husband, Appellee Richard N. Robertson. Appellant was never given any actual notice of the adoption proceedings, and as a result, he did not participate in any stages of the adoption process. After learning of the final order of adoption, Appellant brought on an application in the

1. For the purposes of this Jurisdictional Statement, the term "putative father" will be defined as set forth in Black's Law Dictionary 1402 (4th Ed. 1958): "The alleged or reputed father of an illegitimate child." "Putative father" and "unwed father" shall also be deemed synonymous.

said Ulster County Family Court to open, vacate and set aside the final order of adoption, and further, for inspection of the sealed records of such adoption proceeding. Among the grounds alleged by the Appellant in support of his application was that Section 111 and Section 111a of the Domestic Relations Law of the State of New York as construed by the court were unconstitutional as they denied him his Constitutional rights of due process and equal protection under the laws as provided by the Fourteenth Amendment to the United States Constitution. The lower court denied Appellant's application in its entirety; and said decision was affirmed by the Appellate Division, Third Department, and by the New York State Court of Appeals.

(b) Facts

Appellant and Appellee Loraine Robertson (hereinafter referred to as Lorraine)

first met in 1971. Their relationship was sporadic until 1974 when they began living together in Westchester County. At that time Lorraine already has a one and one half year old child, Renee, who had been born out-of-wedlock, the Appellant herein not being the father of Renee. After approximately two years of living together, Jessica was born on November 9, 1976 (Appendix A, p. 4). When Jessica was born, Appellant was 24 years of age and Lorraine was 21 years. Upon Jessica's birth, Appellant visited Lorraine each day at the hospital during father's visiting time. Throughout her pregnancy, and even after the birth of Jessica, Lorraine had acknowledged to others that Appellant was the father of Jessica.[2]

2. 2 It should be noted that Lorraine has never denied that Appellant is Jessica's father. She merely states in an affidavit "Finally I repeat and reiterate that I have never conceded in any court proceeding anywhere nor do I now concede for the purpose of this proceeding, that Jonathan Lehr [appellant] is the father of my child [Jessica]". (Emphasis added) (R-117)

During her pregnancy there was even a short engagement with Appellant. After leaving the hospital, Lorraine withheld her whereabouts from Appellant.[3] Appellant claims that from the time Jessica was born on November 9, 1976, until August 1978 (a period of approximately 20 months), Lorraine concealed from the Appellant the whereabouts of herself and the infant Jessica, for approximately 14 months of that 20 month period (R-55). Lorraine admits that she concealed her whereabouts and that of Jessica, but disputes the amount of time (R-116). Lorraine stated that "I had no duty to report my whereabouts to anyone".

During the time of Lorraine's disap-

3. It should also be noted that Appellant contends that Lorraine had led him to believe that his name was on Jessica's birth certificate as the father. Lorraine disputes this.

pearance, Appellant made numerous attempts to locate her and was successful on a number of occasions (R-53). During those times Appellant would see Jessica, on those occasions when Lorraine would let him. But Lorraine kept moving with Jessica, making it difficult for Appellant to locate her (R-54). Appellant made inquiries of Lorraine's friends as well as made use of a detective agency to locate Lorraine. On one occasion when Appellant saw Lorraine, Appellant offered to give financial assistance to Lorraine and Jessica; however, Lorraine refused (R-54,55).

In August of 1978, Appellant finally located Lorraine's whereabouts. She was living in Milton, New York, under her married name, Lorraine Robertson (R-54). Lorraine, in a telephone conversation with Appellant (Lorraine had called Ap-

pellant's mother and Appellant was present), told Appellant to stay away or be arrested (R-54). Having nowhere else to turn, Appellant sought legal advice in December of 1978.

On December 12, 1978, at the request of Appellant, Appellant's attorney forwarded a letter to Lorraine requesting that Lorraine communicate with him so that arrangements could be made for Appellant to see Jessica (R-77). No response was forthcoming from that letter and on January 8, 1979. a second letter was forwarded. This letter was "refused" (R-78,79, Appendix A, p.16).

After receiving no further response from Lorraine, Appellant, wishing to see Jessica, filed a paternity petition in the Family Court, Westchester County, on January 30, 1979, in which he acknowledged that he was the natural father of Jessica and he requested visitation rights

(Appendix C p. 3). Lorraine received notice of these paternity proceedings by receipt of the paternity petition on February 22, 1979 (Appendix C p. 3).

Unknown to Appellant, Appellees Lorraine and her husband, Richard N. Robertson, had instituted adoption proceedings for Jessica on or about December 21, 1978 in the Ulster County Family Court. No notice of these adoption proceedings was given to Appellant (Appendix C p.3). On February 26, 1979, while the adoption proceeding was pending, the Family Court judge presiding over the adoption proceeding was notified of Appellant's paternity petition. This notification came ten (10) days prior to the signing of the final order of adoption (Appendix A p. 4 ; Appendix C p.4). Upon learning of Appellant's status as the putative father, the lower court judge simultaneously signed an order to show cause

submitted by Appellees, the purpose of which was to change the venue of the paternity proceeding from Westchester County to Ulster County so that both the adoption and paternity proceedings could be held together. The return date of the said order to show cause was March 12, 1979 (the same date that the paternity petition was returnable) (Appendix A p. 4). The lower court judge still refused to have Appellant notified of the adoption proceedings. Appellant acknowledges that on Saturday, March 3, 1979, he received said order to show cause and affidavit of Appellee's attorney which contained a reference to the pending adoption proceedings. This was the first time Appellant had any knowledge of the pending adoption proceedings (Appendix A p. 4). See Appendix G for precise statements made by Appellees' attorney.

On March 7, 1979, Appellant's attorney

telephoned the Ulster County Family Court Judge, advising him that an order to show cause staying the adoption proceedings was ready to be submitted; however, the Family Court Judge advised him that the order of adoption had already been signed that morning, thereby terminating Appellant's parental ties (Appendix A p.4 Appendix C p. 4 [4]).

Appellees thereafter made a motion to dismiss the paternity proceedings which, in light of the final order of adoption, was granted, without prejudice. Upon receipt of the decision of Appellees said motion, Appellant herein commenced proceedings in the Ulster County Family

4. As Chief Justice Cooke noted in his dissent, it is unclear as to why the judge signed the adoption order on March 7, 1979 when the change of venue motion, predicated in part upon both the adoption and paternity proceedings being held together, was returnable 5 days later on March 12, 1979. (Appendix A- p. 17)

Court to have the adoption vacated, opened and set aside, and for a further order requesting an inspection of the sealed records of said adoption proceeding.

(c) How the Federal Question is Presented.

In his proceeding brought in the Ulster County Family Court to open, vacate and set aside the order of adoption, Appellant argued that Section 111 and Section 111a of the New York Domestic Relations law were unconstitutional in that as construed by the lower court, they denied him due process and equal protection. In particular, Appellant made the following arguments: (i) By not requiring that notice of the adoption proceedings be given to him based upon the facts of this case, Section 111a.2 and Section 111.3 violated his procedu-

ral due process rights[5] and (ii) By having his parental rights terminated without having the opportunity to be heard as to his fitness, Appellant was denied his substantive due process rights;[6] and (iii) that since all other parents, including unwed mothers, divorced parents, wed parents, as well as certain unwed fathers, were given notice, and all except the unwed fathers were given the opportunity to withhold their consent to the adoption, Appellant was being denied due process and equal portection of the laws. In support of those arguments, Appellant cited Stanley v. Illinois, 405 U.S. 645 (1972) and Caban v. Mohammed, 441 U.S. 380 (1979). See Appendix H for excerpts

5. Section 111a.2 sets forth categories of putative fathers entitled to notice while Section 111.3 gives the court discretion to send notice to parents whose consent is not required.

6. Section 111a.3 of the Domestic Relations Law only permits an unwed father to give testimony as to the child's best interest and precludes the hearing of testimony as to his fitness.

from Appellant's Petition submitted to the Family Court (R-58,60).

The Ulster County Family Court Judge, in his decision (Appendix C) rejected these arguments. With respect to the arguments as to the constitutionality of Section 111, the court indicated that it was foreclosed from considering this issue because Caban v. Mohammed, supra, had already declared that statute unconstitutional[7] (Appendix C p.14). With respect to the constitutionality of Section 111a and its notice provisions, the court held that Section 111a codified the minimum protections of Stanley v. Illinois, supra, and that the distinction drawn by the statute between unwed fathers and all other parents with respect to notice and the role played in the adoption pro-

7. Thus, the Family Court Judge held that Caban v. Mohammed, supra, should be retroactively applied to this case.

ceeding was rational and reasonable (Appendix C p. 16). The court dismissed Appellant's argument that since the court had actual knowledge of Appellant's identity and interest, he had done more than the statute required and had complied with the spirit and intent of the statute. Indeed, the statute provided that notice be given to an unwed father who filed a notice of intent to claim paternity in a putative father's registry thus giving the court only constructive knowledge of the identity of the putative father. In the instant case, the court and the parties had actual knowledge (Section 111a.2(c), Appendix F p. 13). The court, however, stated that since adoption was a creature of statute, it must be strictly construed (Appendix C p. 6). The court found "...no unconstitutional infirmity in the statute." (Appendix C p. 16).

The Appellant again reiterated his arguments in the Appellate Division, Third Department, arguing strongly that Stanley v. Illinois, supra, had classified a putative father's interest in his child as "significant and cognizable", thereby affording him due process and equal portection. Notice and an opportunity to be heard were essential before there could be a final termination of parental rights.[8] Appellant claimed that Section 111 and Section 111a were based on the State objective of speed and efficiency rather than the safeguard of constitutional rights. The statute was clearly based upon a series of unrebuttable presumptions made by the State that un-

8. Appellant cited a long list of State court decisions which interpreted Stanley v. Illinois, supra, as requiring notice of an adoption proceeding to "...any person or persons who it has reason to believe might be the father." Matter of Donna P. 80 Misc. 2d 129 (1974).

wed fathers are inherently unfit as opposed to unwed mothers and other parents. Appellant argued that Stanley v. Illinois, supra, held that a statute based upon such a classification denied equal protection to Peter Stanley.

The Appellate Division, Third Department recognized that Stanley v. Illinois, supra, as interpreted by the New York Court of Appeals in Malpica Orsini, 36 N.Y. 2d 568, app. dsm'd sub nom Orsini v. Blasi, 423 U.S. 1042, required that notice and an opportunity to be heard be given to unwed fathers. It stated (Appendix B p.3):

> "... notice and an opportunity to be heard must be afforded an unwed father before his parental rights were terminated."

However, the Appellate Division concluded that since Appellant had not exactly

fit into any of the categories of Section 111a.2, he had no right to notice. The Appellate Division indicated "... nor do we find any constitutional infirmity in this section. [Section 111a]" (Appendix B p. 4[9]). The Appellate Division did not address itself to the specific issues of substantive due process (Appellant's right to a hearing as to his fitness) and equal protection (Appellant's claim that Section 111 and Section 111a unconstitutionally treated him different than other parents, including unwed mothers, wed parents, divorced parents, and other unwed fathers).

In the Court of Appeals, Appellant continued his attack upon the constitutionality of Section 111 and Section 111a of the Domestic Relations Law using in es-

9. The Appellate Division did not address itself to the constitutionality of Section 111.

sence the same arguments used below. This attack was divided into two categories: first, that the statute as construed herein by the courts violated his due process and equal protection rights under pre Caban v. Mohammed law; and second, that if the rule of law annunciated by this Court in Caban v. Mohammed were to be applied to this case (although decided six weeks after the order of adoption was signed), said statutes would also be rendered unconstitutional. These arguments were set forth alternatively, and either standing on its own, would constitute a sufficient basis to declare said statutes unconstitutional. This two-fold attack was specifically mentioned in Point III of Appellant's brief, excerpts of which are included in Appendix I. Once again, Appellant's

due process argument under pre Caban v. Mohammed, supra, law, cited Stanley v. Illinois,supra, and a series of other cases, to wit, Armstrong v. Manzo, 380 U.S. 545 (1965); Goldberg v. Kelley, 397 U.S. 254; Mullane v. Central Hanover Trust Co., 339 U.S. 306, as standing for the proposition that Appellant, as a readily ascertainable putative father who has expressed an interest in his child, must be afforded notice of and the opportunity to be heard in the adoption proceeding before his parental rights could be terminated.[10] Further, as Appel-[11]

10. It should be noted here that Appellant commenced his paternity petition, coupled with a request for visitation, in Westchester County Court before he had any knowledge of the adoption proceedings.

11. While Appellant did find out about the pending adoption proceedings in the Appellees' change of venue motion (see AppendixA p.4), the Family Court signed the adoption order 4 days later, before Appellant had a chance to take legal steps. Appellant argued that this was not sufficient notice and cited Armstrong v. Manzo, 380 U.S. 545, 550, to support him.

lant argued, did not Section 111a.3 preclude him from offering testimony as to his fitness by limiting the role of all unwed fathers to giving testimony as to the child's best interests. Appellant argued that this violated his substantive due process rights as annunciated in Stanley v. Illinois, and upon what governmental objective did these statutes base their different treatment of putative fathers from other parents, including unwed mothers, wed parents, and divorced parents? Why were they given notice and not the Appellant? Why were they allowed to veto an adoption and not the Appellant? And why was Appellant not included in the categories of unwed fathers as set forth in the statute (111a)?[12] Appellant argued that

12. See Appendix J for excerpts from Appellant's brief in Court of Appeals setting forth the statutory classifications complained of.

these acts of discrimination by the Legislature were not and could not be substantially related to the achievement of any governmental objective. See Craig v. Boren, 429 U.S. 190 at 197 (1976). Why was a putative father who filed an intent to claim paternity in a putative father registry more entitled to notice than Appellant who instituted a paternity proceeding? How could the court herein assume that the Appellant herein had no relationship with his child, or had no substantial input as to the child's best interests. Clearly, as Appellant argued, the statutory discrimination against him was based on the archaic notions that putative fathers are unfit.

The Court of Appeals, in its decision, acknowledged Appellant's constitutional claims. As Judge Jones indicates (Appendix A p. 5):

> "In this perspective we first address the constitutional contentions advanced by Petitioner. He asserts that as Jessica's father he had a constitutional right to receive formal notice of the adoption proceeding (and thus to participate therein), and that granting the order of adoption without his consent deprived him of his constitutional rights."

Instead of analyzing, however, Appellant's constitutional contentions based on pre Caban v. Mohammed law, the majority decided to analyze Appellant's argument in terms of whether Caban v. Mohammed, supra, should be retroactively applied to the facts of this case.[13]

13. The dissenting opinion recognized the majority's failure to analyze Appellant's constitutional claims based upon pre Caban v. Mohammed law. Chief Judge Cooke stated: "The decision of the Supreme Court in that case (Caban v. Mohammed), however, does not resolve all of the issues presented on this appeal. Under pre Caban law, it was recognized that a putative father is entitled at least to notice and an opportunity to be heard concerning whether adoption would be in his child's best interests (see Quilloin v. Walcott 434 U.S. 246 ...other cases and law review articles cited" (Appendix A p.14).

As noted previously, Appellant did argue in the Court of Appeals as well as in the Appellate Division and the Family Court, that the holding of Caban v. Mohammed, supra, should be applied to the facts of this case; however, that argument was and remains an alternative argument (see Appendix I p. 3). Appellant argued that since all parents are at least initially entitled to consent (absent a finding of abandonment, etc.), all parents must be afforded equal treatment, including the giving of notice. The Family Court held that Caban should be retroactively applied to this case, while both the Appellate Division and the Court of Appeals held it was not entitled to retroactive effect, despite Appellant's arguments that this case was in judicial review at the time Caban was decided, and

that the facts of this case warranted the retroactive application of Caban.

Thus, while the Court of Appeals did not analyze Appellant's pre Caban and post Caban arguments, it acknowledged that Appellant had duly raised his claim that he had been denied his constitutional rights of due process and equal protection under the Fourteenth Amendment to the United States Constitution by virtue of the application of Section 111 and Section 111a of the Domestic Relations Law of New York. Appellant was denied a right to notice of the adoption proceedings because he was not in the category of putative fathers entitled to notice pursuant to Section 111a.2 and was not within the category of parents who were entitled to receive notice pursuant to Section 111.3. As a result of this denial, Applicant could not assert

his substantive rights such as his right to a hearing as to his fitness and his right to come forth with testimony as to his relationship with the child. The Court of Appeals therefore considered and upheld the constitutionality of said statutes despite Applicant's attack on their constitutionality, and consequently upheld the validity of the order of adoption.

The Questions Are Substantial

In the past decade, this Court has handed down three (3) major decisions in the area dealing with the substantive rights of putative fathers in the adoption proceedings of their illegitimate children. These cases are Stanley v. Illinois, 405 U.S. 645, 92 S.Ct.1208; Quilloin v. Walcott, 434 U.S. 246 (1978); and Caban v. Mohammed, 441 U.S. 380(1979).

While these cases have, indeed, significantly expanded the heretofore almost non-existent rights of putative fathers, this evolution of law has also introduced a considerable amount of uncertainty in the adoption process. Throughout the country many State Legislatures as well as the courts in construing State statutes have been unable to pinpoint with any degree of certainty this new role of the putative father in the adoption process. However, as noted, these cases have dealt with the substantive rights of the putative father in the adoption process, to wit, the question of whether all putative fathers are entitled to a hearing as to their fitness before their parental rights may be terminated (Stanley, supra); or as a condition precedent to such right, whether a putative father must establish that he has had a re-

lationship with the child before his entitlement to such a hearing (Quilloin, supra); or whether all putative fathers are possessed with the same rights as an unwed mother in an adoption proceeding in all cases, or just where an older child is involved, or where there is a showing of some type of relationship (Caban supra). This case, however, poses a new question - procedural rights.

(a) Due Process

It seems elementary that in order to assert and prove the extent of these newly founded substantive rights, putative fathers must receive notice of and the opportunity to be heard in the adoption proceedings. Yet the Court, in deciding these cases, was never given this issue of procedural due process to decide. In each of the cases, the putative father was given notice of the proceedings and participated therein. The im-

portance of a clarification, however, as to which, if not all, putative fathers are entitled to notice, and the manner of such notice, is of significant magnitude, even more so than the extent of the substantive rights of a putative father. If there is no classification made as to these procedural rights, no adoption proceedings, which are conducted without notice to a putative father, will be free from a later attack on the adoption by such a putative father, which attack may be made months or possibly years after the adoption. When substantive rights are involved, however, a putative father who is not pleased with results of an adoption hearing, such as where his parental rights have been terminated, must take an immediate appeal since he was a party to the adoption proceedings. Thus, there is finality and

stability.

It is submitted, however, that while the above mentioned cases do not deal directly with issue of procedural due process, there is sufficient reference to this right in those cases as well as others which would indicate that the Appellant herein, as such a putative father, was definitely entitled to notice and the opportunity to be heard in the adoption proceedings of his daughter, and that his failure to receive such notice constituted a violation of his Fourteenth Amendment rights of due process and equal protection.

There can be no question but that Stanley v. Illinois, 405 U.S. 645, has established that a putative father has such a significant interest in his child, that all proceedings which sever this relationship must take cognizance of his

claim to treatment in accordance with his rights of due process and equal protection as provided him by the Fourteenth Amendment of the United States Constitution. While Stanley was a custody case, it was quickly applied to adoption cases by this Court in Rothstein v. Lutheran Social Services, et al, 405 U.S. 1051 (1972). Notice and the opportunity to be heard are minimal requirements of due process. In Stanley, supra, Peter Stanley did not raise the issue of notice since he was notified of, and took part in, all proceedings, but since as Stanley held "... all Illinois parents are constitutionally entitled to a hearing on their fitness..." p. 658, the question arises as to how or in what manner they were to receive notice. Footnote 9 on page 657 gives a strong indication of the Court's feeling on this issue. In facing the

problem of how to notify each unwed father of his individualized hearing on fitness, the Court made an analogy to the Illinois law governing procedure in juvenile cases where is provided notice by personal service, notice by certified mail, or "...for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of 'All whom it may Concern'." Thus, the Court in Stanley indicated that notice would go to all putative fathers, even those who were unknown and had to be served by publication. If they did not respond and did not request a hearing, they would be forever barred from challenging the adoption. Indeed, this is not a novel approach. The Court had stated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) at p. 317:

> "Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." (citing Jacobs v. Roberts 223 U.S. 261 (1912); Blinn v. Nelson, 222 U.S. 1 (1911)

In the instant case, however, the Court would not have to be concerned about this factor since Appellant was known and an ascertainable putative father. However, Section 111a and Section 111 denied him notice and subsequently his rights to his "individualized" hearing as required by Stanley. The impact of Stanley on this issue of notice was immediately seen in Rothstein v. Lutheran Social Services of Wisc., 405 U.S. 51 when this Court remanded that case in light of Stanley. In Rothstein, the parental rights of an unwed father were terminated in an adop-

tion proceeding without notice to the father. On remand, the Court held that the putative father had been improperly denied a hearing.

In Quilloin v. Walcott, 434 U.S. 245, the Court, in deciding whether or not a putative father's consent was required in an adoption proceeding, was once again not faced with the issue of notice. However, the Court did take note in footnote 7 on page 250 that the putative father had been notified by the State's Department of Human Resources that an adoption proceeding had been filed. Further, the Court stated at p. 253:

> "At the outset we observe that Appellant does not challenge the sufficiency of the notice he received with respect to the adoption proceeding, see n.7, supra, nor can he claim that he was deprived of a right to a hearing on his individualized interests in his child, prior to the entry of the order of

> adoption although the trial court's conclusion was that Appellant lacked standing to object to the adoption. This conclusion was reached only after Appellant had been afforded a full hearing on his legitimation petition, at which he was given the opportunity to offer evidence on any matter he thought relevant including his fitness as a parent."

This quote clearly coincides with the implication in Stanley that all putative fathers have their right to an "individualized hearing and therefore must be given notice of and the opportunity to be heard in the adoption proceedings even though that putative father may not have any right to prevent the adoption, as in Quilloin. This latter point is very important. It is apparent that the New York Court of Appeals decision herein grossly misinterpreted this concept. From the Record submitted, Judge Jones indicated that in Appellant's peti-

tion and supporting papers to open the adoption proceeding, there was "... no tender of evidence directly bearing on the best interests of Jessica." Therefore, Judge Jones continued: (Appendix A, p. 12, 13)

> "...it was certainly reasonable to deny petitioner's application to reopen the adoption proceedings, the consequences of which, as was then apparent, would have been to render Caban applicable and thereby to accord petitioner not only his right to notice but a power of veto over any adoption, beyond the reach of the courts to supervise or to dispense with, whatever the dictates of Jessica's best interest." (emphasis added)

Is Judge Jones suggesting that Appellant, or for that matter, any putative father, is required to make some prima face showing of his fitness or of his concern for the best interests of the child before he can get procedural due process rights (notice and the opportu-

nity to be heard). Certainly, Stanley and Quilloin do not hold this. Indeed, how can one make a prima face showing if he has no knowledge of the proceeding. The absence or presence of a putative father's substantive rights in an adoption proceeding can only be determined after a full evidentiary hearing as set forth in Quilloin, supra. Since Appellant was never notified of the adoption proceedings, he was denied such a hearing by the application of Section 111 and Section 111a.

Caban v. Mohammed, supra, the third landmark case in this area, also did not deal directly with the notice issue since Caban, the appellant therein, had received notice of the adoption proceedings. However, the Court made specific note of the notice issue in footnote 3:

> "As the Appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied the procedural due process held to be requisite in Stanley v. Illinois, 405 U.S. 645 (1972)."

This interpretation of Stanley by the Court in Caban is right on target. Whatever the substantive rights of a putative father may be, one thing is certain, and is common in all of these decesions, to wit, that all putative fathers are constitutionally entitled to notice and the opportunity to be heard before their parental rights are terminated. Section 111 and Section 111a of the Domestic Relations Law as construed by the lower courts has denied Appellant these constitutional rights.

(b) Equal Protection

This aspect of Appellant's argument

raises the issue as to why other parents including unwed mothers and wed and divorced parents, all are required to receive notice of an adoption proceeding pursuant to Section 111; yet, Appellant as a putative father is prohibited from receiving notice; and further, as to why Appellant has been segregated from other fathers who are entitled to receive notice pursuant to Section 111a.[14] Thus, Appellant has raised two classifications for this Court's scrutiny, gender based as well as non-gender based.

As noted previously, Stanley, supra, stands for the proposition that putative fathers are entitled to the protection of

14. As noted previously in this Statement under "statutory provision", Section 111 was amended affective July 27, 1980 so as to provide notice to certain putative fathers whose consent is now required for adoptions. This is not relevant to these proceedings as Applicant herein still would not be entitled to notice under the amended statute. Section 111a was also amended, but once again, there is no relevance to Appellant since he still would not receive notice. See Appendix F.

the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution as they have a fundamental interest in their child (see also Glona v. American Guarantee and Liability, 391 U.S. 73 (1968). Without expounding on the history of the various tests which this Court has espoused under the Equal Protection Clause of the Fourteenth Amendment, where there is a gender based distinction, the Court has held that any sex based distinction must serve important governmental objectives and must be substantially related to the achievement of thos objective to withstand judicial scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976)[15]:

15. Only a plurality of the Court has classified gender based distinctions as a 'suspect class' requiring the strict scrutiny test. Frontiero v. Richardson, 411 U.S. 677 (1973). Thus, the 'intermediate' test of Craig v. Boren is being espoused here; however, it is submitted that under any test, even the rational basis test or the fair and substantial relations test as espoused in Reed v. Reed, 404 U.S. 71 (1971), Applicant was denied equal protection.

Clearly, a close analysis of the effects and presumptions underlying Section 111 and Section 111a shows that no State objectives have been fostered. Procedurally, a State is concerned with having adoption proceedings conducted without undue delay and with finality so that such proceedings cannot be later attacked. It must garner all evidence so as to insure that the child's best interests are being fostered. Section 111 and Section 111a clearly do not perform these objectives. By not giving notice to Appellant and by limiting the role of all putative fathers, the State has presumed that Appellant is unfit because he is a putative father and has no viable input into the child's best interest. But as the Court stated in Stanley at p. 652: "...that the state registers no gain towards its declared goals when it se-

parates children from the custody of fit parents." Therefore, if an adoption statute is to reflect any genuine concern on the part of the State in protecting the best interests of the child, it must clearly provide for immediate notice to the putative father with an expedited hearing to determine fitness. Further, there would be no undue delay in the proceedings since the Court had knowledge of Appellant's whereabouts. This is not a case where the Court would have to search out the putative father or send notice by publication.[16] The Appellant herein was knocking on the courthouse doors waiting to have his day in court. Indeed, the State objective of finality

16. This would raise the issue of the mother's right of privacy, but this is not present here since the Appellant herein was known to all.

in these proceedings is thrown out the window by failing to provide notice to putative fathers and especially Appellant herein. This case for one would not have been here if Appellant had received notice.

Yet all other parents, including unwed mothers, receive notice under all circumstances.[17] By failing to give Appellant the equal opportunity to appear and to assert his substantive rights, the State, in its enactment of Section 111a and Section 111, has failed to focus on the critical question as to who has a substantial interest in the adoption proceeding. Clearly Appellant has such a substantial interest. What we have here is what Stanley specifically prohibits - a blanket denial of any inquiry into the fit-

17. Under Section 111a unknown unwed fathers will not receive notice even by publication

ness of a putative father. This is no rational objective to be furthered by placing various burdens only upon putative fathers in order to receive notice.[18] To make matters worse, Section 111a, in some instances, makes the putative father's right to notice based upon acts of the unwed mother (Section 111a.2, see Appendix F).

The different treatment of Appellant herein from other unwed fathers as well as from unwed mothers and other parents with respect to notice and their substantive rights in adoption proceedings is an invidious discrimination, and the statute compelling this treatment must be held unconstitutional.

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18. Indeed, Appellant stated that he had never heard of Putative Father Registry (R-56). In Quilloin, supra, at p. 254, the Court pointed out that it would not want to base the termination of parental rights on a statute of which the putative father had no knowledge.

Appellant has raised in the courts below, and now raises the issue of whether Caban v. Mohammed, supra, applies to this case. While the resolution of this issue is not determinative of Appellant's claims,[19] the application of Caban would further exemplify that Appellant has been denied his constitutional rights since he should have been afforded equal footing with the unwed mother at all stages of the adoption proceedings including the right to notice, and to consent.

It is further argued that the order of adoption herein has never become final and thereby Caban is applicable without the necessity of deciding the issue of retroactivity. As this Court has stated in Linkletter v. Walker, 381 U.S. 618

19. See Appendix I p. 3

(1964) at p. 622, footnote 5:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted and the time for petition for certiorari had elapsed prior to our decision in Mapp v. Ohio."

In the instant case, the Family Court decision herein was not even rendered until seven (7) months after Caban was decided! Assuming, however, that the order of adoption herein was final, then it is clear that under the guidelines established by this Court in Linkletter v. Walker, supra, and Chevron Oil Company v. Huson, 404 U.S. 97, the Caban case should be retrospectively applied. In this connection we can use the reasoning espoused by the Tennessee Court of Appeals in In Re Riggs, 612 S.W. 2d 461 in applying Caban retroactively to facts strikingly similar to those of the instant case:

> "The appellants contend that we cannot apply the guidelines set out in Caban to the case at bar because Caban cannot be retroactively applied. We disagree. Caban does not overrule clear past precedent on which litigants may have relied, nor does it decide an issue of first impression whose resolution was not clearly foreshadowed. In determining whether Caban can be retroactively applied, this court has followed the test of the United States Supreme Court and weighed the merits and demerits in this 'case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'." Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L Ed. 2d 601 (1965); Chevron Oil Company v. Huson, 404 U.S 97, 107, 92 S.Ct. 349, 355 30 L. Ed 2d 296 (1971).

The state courts in this case had before them, pre Caban law of Stanley and Quilloin which clearly showcased the emergence of the putative fathers' constitutional rights. Instead of following this

trend, the state courts herein took it upon themselves to reverse that trend and narrowly define the putative fathers' rights. Caban did not overrule a long line of decisions nor can it be said that the issues presented were of first impression. Caban merely followed the rule of law annunciated in Stanley, Quilloin, and Craig v. Boren, which clearly set forth the standards which should have been applied in this case.[20.]

If this Court feels that the rule of Caban is required to sustain the Appellant's position herein, then it must take into account the hardship and inequity imposed upon Appellant. He has been deprived of the most precious of human rights, his child, without being heard.

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20. The Family Court retrospectively applied Caban, but found no constitutional infirmity. (Appendix C p. 18).

No counterbalancing hardship which may be placed upon the State by the retrospective application of this case can be sufficient. How many adoptions will be overturned based on the facts of this case?[21] How many putative fathers will now come forth to assert their rights to notification and the opportunity to be heard, and if so, how many will be successful in attempting to show their fitness or their relationship to the child which would warrant the vacating of prior orders of adoption? Not many; or not so many as would make it unduly harsh on the State in light of the horrendous denial to Appellant of his due process and equal protection rights, and of his child.

21. It appears that the adoption could stand until a hearing is held to determine what, if any, substantive rights the father is entitled to. In most instances the adoption will stand.

Conclusion

The Court here has the opportunity to expound upon and clarify an emerging area of law which is in a state of flux and uncertainty, as well as to right a wrong which has been perpetrated on Appellant. Because of the highly sensitive nature of adoptions and the need for finality in these proceedings, basic concepts such as due process and equal protection must be adequately defined, but "time is of the essence." Cohabitation without the accompaniment of a marriage ceremony is no longer a rare situation. The number of children born of this type of arrangement are fast growing. Many of these unwed fathers have a strong interest in these children, and others do not; however, statutes, like the one in issue in this case which sterotype all unwed fathers as having an inferior in-

terest in their child, must not be allowed to stand. Before any parent's parental ties are forever cut off, he or she, be they unwed, wed, or divorced, must be given the same opportunity to assert their interests in the child. Notice of proceedings designed to terminate these rights is essential. This case gives the Court the type of clear cut issue which it needs to set the necessary guidelines.

It is respectfully submitted that this Court note jurisdiction and give plenary consideration to the constitutional rights of not only the Appellant herein, but of the new class of fathers who have emerged in our society.

Respectfully submitted,

David J. Freeman

David J. Freeman, Esq.
Attorney for Appellant
175 Main Street
White Plains, N.Y. 10601
(914) 949-3311

Appendix

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
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81-1756

No. A-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In the Matter of the Adoption of Jessica Martz, a Minor under the age of fourteen years, by

JONATHAN LEHR,

Appellant,

v.

LORRAINE ROBERTSON, RICHARD N. ROBERTSON, et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK (Case No. 565)

APPELLANT'S APPENDIX

DAVID J. FREEMAN, ESQ.
175 Main Street
White Plains, New York 10601
(914) 949-3311
Attorney for Appellant

(12168)

No. A-704

SUPREME COURT OF THE UNITED STATES

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David J. Freeman, Esq.
Attorney for Appellant
175 Main Street
White Plains, N.Y.
10601
(914) 949-3311

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APPENDIX A--OPINION OF COURT OF APPEALS, NOVEMBER 24, 1981.

STATE OF NEW YORK

COURT OF APPEALS

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3 No. 565
In the Matter of Jessica "XX".

Jonathan "YY",

Appellant,

Lorraine "WW" &ano.,

Respondents,

Robert Abrams, as Attorney General,

Intervenor-Respondent.

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(565) David J. Freeman, White Plains, for appellant.

Jay L. Samoff, Kingston, for respondents.

Robert Abrams, Attorney-General (Robert J. Schack & Shirley Adelson Siegel of counsel) intervenor-respondent pro se.

JONES, J.

Neither the decision of the Supreme Court of the United States in Caban v. Mohammed (441 US 380) nor its rationale is applicable to an adoption proceeding which had been finally determined and concluded prior to the announcement of that decision. Nor was it an abuse of discretion in the circumstances of this case for the Family Court Judge either to grant the final order of adoption without giving notice to the putative father of whose identity and interest the Judge previously had

knowledge or thereafter to deny the application of the putative father to vacate the final order of adoption and to reopen the adoption proceedings.

(Continued on page A 4)

The factual context out of which the legal issues presented in this case arise is not significantly disputed. The mother respondent in this proceeding and petitioner had lived together for two years prior to the birth of Jessica on November 9, 1976. In August, 1977 the mother married her present husband, the other respondent.

On December 21, 1978 the stepfather, joined by the mother, instituted a proceeding in Family Court, Ulster County, for his adoption of Jessica. A hearing in that proceeding was held on January 15, 1979 at the conclusion of which the Family Court Judge ordered the Ulster County Social Services Department to make the customary investigation pursuant to the provisions of section 116 of the Domestic Relations Law. When the favorable report of that investigation (which addressed only the mother, the adoptive father and Jessica) was received on February 26, the mother's attorney informed the Family Court Judge that petitioner had instituted a paternity proceeding in Family Court, Westchester County, claiming to be Jessica's father.[1] At the instance of the attorney the Family Court Judge in Ulster County signed an order to show cause returnable March 12, 1979 (the return date in the paternity proceeding) bringing on the mother's application to change the venue of the paternity proceeding from Westchester to Ulster County. Petitioner was served with a copy of the order to show cause on Saturday, March 3, 1979, and then learned for the first time of the pendency of the adoption proceeding. On the following Wednesday, March 7, 1979, at the request of the attorney for respondents, the Family Court Judge signed the final order of adoption. Thereafter, but on the same day, the attorney for petitioner telephoned the Family Court Judge to request an adjournment of the adoption proceedings and was informed that his request came too late inasmuch as the final order of adoption had already been signed.

Subsequently, by petition verified on June 13, 1979, petitioner instituted the present proceeding to vacate the final

1. The paternity proceeding had been commenced on January 30, 1979 and personal service of the summons therein made on the mother on February 22, 1979.

order of adoption and to reopen the adoption proceedings.[2] That application was denied by the Ulster County Family Court on November 30, 1979. The Appellate Division affirmed, one Justice dissenting, on December 11, 1980. Petitioner has appealed to our court as of right pursuant to CPLR 5601 (subd [a], par [i]).

At the outset we take note of the nature of the case before us. It involves an attempt, in an independent proceeding, by one who was not a party to a judicial proceeding which has been concluded to mount a direct attack on the final determination made therein. It is to be distinguished from the more frequently encountered attempt of one who was a party to a judicial proceeding which concluded in a disposition adverse to him, to enlist the aid of the courts to vacate or modify that disposition by means other than direct appellate review.

In this perspective we first address the constitutional contentions advanced by petitioner. He asserts that as Jessica's father he had a constitutional right to receive formal notice of the adoption proceeding (and thus to participate therein) and that granting the order of adoption without his consent deprived him of his constitutional rights. He would rely heavily on the decision of the Supreme Court of the United States in *Caban v Mohammed* (441 US 380, *supra*) in which that court, reversing a decision of our court (*Matter of David A. C.*, 43 NY2d 708), held that section 111 of the Domestic Relations Law was unconstitutional in that it arbitrarily discriminated between mothers and fathers of children born out of wedlock by requiring the consent to adoption of the former but not of the latter. It is petitioner's submission that that decision mandates a reversal of the orders of the lower courts in this case denying his application to vacate the order of adoption and to reopen the adoption proceeding. He argues that to the extent that section 111-a did not require that he be given formal notice of the adoption proceeding and that section 111 did not provide that his consent was required before Jessica could

2. The petition also sought an order unsealing the records in the adoption proceeding to permit their inspection by petitioner. The denial of that relief by the Ulster County Family Court was also affirmed at the Appellate Division.

be adopted, each section is unconstitutional as denying him the equal protection and due process rights enunciated in *Caban*.

We have no occasion to reach or resolve the substantive aspects of petitioner's contentions. The decision in *Caban* was announced on April 24, 1979, nearly seven weeks after the final order of adoption in this case. The adoption proceeding was completed with the entry of that order. The present application, as previously noted, is a postterminination attack on the final determination in the adoption proceeding by one who was not a party to that proceeding.[3] We conclude that, unless the Supreme Court itself accords full retroactive effect to its holding, the decision and the rationale of *Caban* should be applied only to actions and proceedings that were still in the judicial process at the time the decision was announced or that have since been commenced, and not to actions and proceedings which had been finally determined and whose judicial life had then expired (cf. *People v Torres*, 53 NY2d 213; see *Gager v White*, 53 NY2d 475, 482). To accord full retroactive effect to *Caban* and to the extension of its rationale to the notice requirements of our adoption statute (and thus to allow its doctrine to be invoked on applications attacking adoption proceedings long since finally concluded) would be, as the dissenters in *Caban* implied (441 US 380, 401, 415-416, *supra*), to work cruel havoc. Accordingly, we hold that sections 111 and 111-a of the Domestic Relations Law as invoked in the adoption proceeding here are immune from constitutional assault predicated on *Caban* and its rationale in the present postfinal determination proceeding (cf. *Chevron Oil Co. v Huson*, 404 US 97, 106-107.)[4]

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3. There is no merit to petitioner's argument that the adoption proceeding should be deemed to have still been in the appellate process in consequence of his filing a purported notice of appeal from the final order of adoption on April 23, 1979. Whatever other rejoinders might be made, it suffices for present purposes to observe that his right to appeal has never been accorded judicial recognition nor has any appeal based on the purported notice of appeal ever been perfected. The present proceeding stems from the order to show cause obtained by petitioner on his petition initiating an independent proceeding to attack the final order of adoption.

4. In view of this conclusion, we have no occasion and do not consider

(n. contd.)

Still bearing in mind that petitioner was not a party to the adoption proceeding and having concluded that *Caban* gives him no constitutional right to disturb its final disposition, we turn to his contentions that it was an abuse of discretion in the circumstances for the Ulster County Judge first to have signed the final order of adoption on March 7, 1979 and then later to have denied petitioner's application, in the proceeding now before us, to vacate that final order and to reopen the adoption proceedings. Our evaluation of petitioner's assertions of abuse of discretion must be judged, not with the benefit of informed hindsight, but on the basis of what was known to the Family Court Judge at the time he signed the final order of adoption and at the time he denied the application to vacate and to reopen the adoption proceedings.

On March 7, 1979 all the statutory prerequisites to the signing of a final order of adoption had been met. All persons made necessary parties under our statutes and decisional law at that time were before the court, and the only consent then so required, that of the mother, had been obtained. Petitioner does not claim that he came within any of the seven categories then defined in paragraphs (a) through (g) of subdivision 2 of section 111-a of the Domestic Relations Law[5] as statutorily entitled to notice of the

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respondents' contention that, inasmuch as petitioner did not come within the embrace of any of the seven categories of subdivision 2 of section 111-a, he has no standing to challenge the constitutionality of the section.

There is no merit to petitioner's contention that the provisions of chapter 575 of the Laws of 1980, amending section 111-a and enacting a new section 111-b apply to this case. The adoption here became final on March 7, 1979 prior to the enactment of chapter 575.

5. Subdivisions 2 to 4 of section 111-a as they existed on March 7, 1979, i.e., prior to amendment by chapter 575 of the Laws of 1980 provided:

"2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

"(a) any person adjudicated by a court in this state to be the father of the child;

"(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

"(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(n. contd.)

proceeding or that the necessity of his consent to the adoption was specified in the provisions of section 111. The court had received the report of investigation made by the Ulster County Department of Social Services as required by section 116 of the Domestic Relations Law which was in all respects favorable to the adoption. Accordingly, being "satisfied that the best interests of the adoptive child [would] be promoted thereby" the Family Court Judge made the order approving the adoption. There was then no reason to consider any possible rights that petitioner might have inasmuch as our court, and apparently the Supreme Court, had recently declared that he had none (cf. *Matter of Malpica-Orsini*, 36 NY2d 568, app dsmd *sub nom. Orsini v Blasi*, 423 US 1042).

At the threshold we reject petitioner's assertions that the order of adoption should be set aside because respondents fraudulently concealed information from the Family Court and because the Family Court improperly waived a statutory prerequisite for adoption. The claim of fraudulent con-

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"(d) any person who is recorded on the child's birth certificate as the child's father;

"(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

"(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

"(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

"3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

"4. Notice under this section shall be given at least twenty days prior to the proceeding by delivery of a copy of the petition and notice to the person. Upon a showing to the court, by affidavit or otherwise, on or before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the person's last known address with reasonable effort, notice may be given, without prior court order therefor, at least twenty days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity pursuant to section three hundred seventy-two-c of the social services law, to the address last entered therein. Notice by publication shall not be required to be given to a person entitled to notice pursuant to the provisions of this section."

cealment is constructed on two propositions, first, that the mother submitted documentary evidence which she knew to be false, to wit, Jessica's birth certificate, and second, that she failed "to divulge to the court the factual background of the life of the natural parents and the infant". On examination it appears that the substance of the argument on both branches is the asserted failure of the mother to admit that petitioner was Jessica's father and to bring petitioner's existence and identity, as father of Jessica, to the attention of the Family Court. There is no merit to this argument. The natural mother had no obligation to admit paternity or to volunteer any information with respect to petitioner, and there is nothing in the record to suggest that she failed to respond fully to all queries put to her by the court or by the Ulster County Social Services Department when it conducted the court-ordered investigation. And, of course, as petitioner vigorously asserts as basic predicate for his entire application, the Family Court was fully aware of his existence and identity as well as his claim of paternity before the final order of adoption was granted.

Similarly, there is no merit to petitioner's assertion (with its attendant insinuations) that the family Court Judge "waived the six months' residency requirement". Section 116 of the Domestic Relations Law on which he premises his assertion explicitly excepts from its prescribed waiting period instances in which "the spouse of the adoptive parent is the natural parent of the child and the child has resided with the natural parent and adoptive parent for more than six months", both of which stipulations were indisputably met in this case.

The only contention of substance advanced by petitioner is that it was an abuse of discretion on the part of the Ulster County Family Court Judge, with knowledge of petitioner's identity and of his assertion that he was Jessica's father, to have granted the order of adoption without first having required at least that he be given the notice required by subdivision 4 of section 111-a. The Family Court Judge could, in the exercise of discretion, have required that formal notice be given petitioner (Domestic Relations Law, § 111, subd 3). If we were to hold, however, that notice

was required to be given to this putative father we would in effect be superimposing a judicial amendment on subdivision 2 of section 111-a—a requirement that notice be given to all putative fathers of which the court had knowledge—for there is nothing in the record in this case to distinguish this petitioner from any putative father of which the adoption court might have actual knowledge.[6]

Section 111-a was added to the Domestic Relations Law by chapter 665 of the Laws of 1976 in consequence of a legislative proposal advanced by the Temporary State Commission on Child Welfare in response to constitutional concerns for the rights of fathers of children born out of wedlock following the decision of the Supreme Court of the United States in *Stanley v Illinois* (405 US 645). It was intended to codify the minimum protections which *Stanley* would require and to achieve finality as early as possible. (Letter from the chairman of the temporary commission to the Governor's counsel, dated July 7, 1976, in the bill jacket for chapter 665; Governor's memorandum on approving the chapter, July 24, 1976, McKinney's Session Laws of NY, 1976, p 2442.) In prescribing who was entitled to notice the Legislature carefully delineated within the board class of putative fathers, to include some (those described in the paragraphs of subdivision 2 of section 111-a) and to exclude the remainder. This was evidently a carefully considered line of demarcation. Proposals had been pressed to expand the categories of putative fathers to whom notice should be required to be given to include fathers who had "filed" acknowledgments of paternity, persons "known" by the mother to be the father, persons holding themselves out to be fathers, and men "voluntarily supporting the child". Such expansion of the notice requirements was rejected as failing to recognize that many of the putative fathers in such categories would

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6. Such a holding might be mischievous in affording a substantive basis for an argument (not unlike that made by petitioner here) that, inasmuch as knowledge of the adoption court of the existence of a putative father would confer legal rights on him, the frilure of the natural mother (who could be expected to know his identity) to identify him to the court should be classified as the perpetration of a fraud on the court in consequence of concealment from it of a material fact.

not be readily identifiable, as thus ignoring the need for a measure of "finality in completed adoptions", and as creating "a constant danger of having failed to give notice resulting thereafter in the reopening of consummated adoptions". *(Id.)* For the Family Court Judge in this instance to have required that notice be given to petitioner for no other reason than that the Judge knew that he claimed to be the father of Jessica would have been to act in derogation of the legislative determination not to include such putative fathers within the scope of section 111-a. As stated, there was no reason to distinguish petitioner from any other putative father who would not be entitled to notice under the terms of the statute.

Moreover, the Legislature had declared that "the sole purpose of notice under [section 111-a] shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child" (§ 111-a, subd 3). Petitioner had made no tender of his ability to furnish any particular or special information relevant to Jessica's best interests. Nor had anything otherwise been brought or come to the attention of the Family Court Judge suggesting that petitioner would be a source of such information—other, of course, than as it could be claimed by every putative father that he was in a position to give background information.

In concluding as we do that there was no abuse of discretion in failing to require that notice be given to petitioner prior to the granting of the final order of adoption, we recognize that there may be a superficial appearance, chiefly because of the brevity of time intervals, which might make one wonder whether it would not have been better in this case to have postponed signature of the final order of adoption until notice had been given to petitioner. We believe, however, that such appearance, if any, arises solely from hindsight and in particular from the unanticipated announcement, but a few weeks later, of the Supreme Court decision in *Caban* which accorded all putative fathers substantially greater legal rights than they previously had been recognized as having. We are willing to speculate, however, that had *Caban* not emerged on the judicial hori-

zon when it did, the decision made by this Family Court Judge to proceed as he did in this case would have clearly appeared to be the only prudent course of action to have followed in the best interests of Jessica.[7]

Finally, we reach petitioner's contention that, even if it was not an abuse of discretion to have granted the order of adoption without having first given him notice, it was an abuse of discretion not to have granted his postadoption application in June, 1979 to reopen the adoption proceeding. Again, although the Family Court Judge had authority to grant that application (Domestic Relations Law, § 114), he chose, in a fully explicated decision, not to do so, and the Appellate Division has affirmed his determination. Here, too, his decision must be examined in the light of the submission then made to him. The court's principal attention and responsibility in any adoption proceeding must be riveted on the best interests of the adoptive child; only secondarily may consideration be given to the interests of the parents. In this instance, the petition and supporting papers contained no tender of evidence directly bearing on the best interests of Jessica. There was a submission with respect to the history of the mother's alleged emotional instability, but this was essentially irrelevant inasmuch as no proposal was advanced at any time that Jessica should be removed from her mother's custody or the home in which she dwelt with her mother and her stepfather; petitioner has never sought more than rights of visitation. In this circumstance it was certainly reasonable to deny petitioner's application to reopen the adoption proceedings, the conse-

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7. Viewing the situation from the perspective of other steps petitioner might have taken, it may be observed that the record discloses that petitioner was aware of the mother's address when his attorney addressed a letter to her on December 12, 1978 seeking to arrange a visitation with "your daughter, Jessica". A follow-up letter was sent on January 8, 1979. Thus, petitioner knew of Jessica's location well before March of 1979. It was open to him for several months prior to the final adoption, had he so desired, to file a notice of intention to claim paternity of Jessica pursuant to section 372-c of the Social Services Law. The filing of such notice would have assured him the right which he sought to participate in the adoption proceedings (Domestic Relations Law, § 111-a, subd 2, par [c]). Additionally, as the Family Court Judge noted, he could have made a prompt application to intervene in the adoption proceeding once notice of its pendency was brought to his attention (CPLR 401, 1012, subd [a]; 1013).

quence of which, as was then apparent, would have been to render *Caban* applicable and thereby to accord petitioner not only a right to notice but a power of veto over any adoption, beyond the reach of the court's to supervise or to dispense with, whatever the dictates of Jessica's best interests. It requires no exercise of the imagination in the circumstances of this case to understand why the Family Court Judge would not have deemed any such course of action to be in Jessica's best interests. In sum, we again conclude that there was no abuse of discretion when petitioner's application to reopen the adoption proceedings was denied.

For the reasons stated, the order of the Appellate Division should be affirmed, with costs.

Chief Judge COOKE (dissenting). I am unable to view the procedure employed by the Family Court Judge in this case as acceptable in law or justice. I therefore respectfully dissent.

Critical in this case is the fact that the Family Court Judge actually knew, prior to signing the adoption order, that petitioner was claiming paternity and seeking visitation rights. Respondents informed the Judge on February 26, 1979 that petitioner had commenced a paternity proceeding in Westchester County. At that time, the Judge signed an order to show cause bringing on the respondent mother's motion to change the venue to Ulster County so that the adoption and paternity proceedings could be held together. Petitioner first learned of the adoption proceeding when he was served with the order to show cause on Saturday, March 3, 1979. Notwithstanding knowledge both that petitioner was formally claiming paternity and that the show cause order was returnable on March 12, the Judge, at the urging of respondents, signed the final adoption order on March 7. In his decision on petitioner's motion to vacate the adoption order, the Judge justified his failure to give petitioner notice and an opportunity to be heard primarily on the ground that no statute specifically directed that notice be given to a putative father in petitioner's position. The majority accepts this justification. I cannot.

There is no quarrel here with the majority's conclusion

that *Caban v Mohammed* (441 US 380), which concerned a putative father's right to consent to adoption, should not be given retroactive effect to an adoption proceeding concluded prior to that decision. The decision of the Supreme Court in that case, however, does not resolve all of the issues presented on this appeal. Under pre-*Caban* law, it was recognized that a putative father is entitled at least to notice and an opportunity to be heard concerning whether adoption would be in his child's best interests (see *Quilloin v Walcott*, 434 US 246; *Matter of Malpica-Orsini*, 36 NY2d 563, 577-578, app dismd *sub nom. Orsini v Blasi*, 423 US 1042; *Doe v Department of Social Servs. of City of Poughkeepsie*, 71 Misc 2d 666; see, generally, Note, 22 William & Mary L Rev 85; Comment, 25 Villanova L Rev 317, 331, 337; Comment, 57 Denver LJ 671, 676-677). The conclusion that *Caban* is not retroactive, therefore, does not justify what I see as the total disregard of petitioner's openly asserted right as a putative father to have at least some input into the decision that will remove the infant Jessica from his reach forever.

The course followed below is rationalized by the majority in part because petitioner, not having filed with the putative father registry (see Social Services Law, § 372-c) a notice of intent to claim paternity, among other things, did not come within any of the seven categories of putative fathers statutorily entitled to notice of an adoption proceeding under section 111-a of the Domestic Relations Law. Section 111-a was added in 1976 (L 1976, ch 665) in response to the Supreme Court's decision in *Stanley v Illinois* (405 US 645). The statute was intended to "provid[e] clear constitutional statutory guidelines for notice to father's of out-of-wedlock children" to accommodate the State's interest in establishing finality in adoption proceedings and in developing an expeditious method for identifying those persons to whom notice must be given, and to give putative fathers, through creation of the registry, a simple means of communicating their interest in the child and protecting their right to be notified (Second Report of the Temporary State Commission on Child Welfare, bill jacket for chapter 665). From the history of section 111-a, it is evident that the Legislature was concerned with protecting

the interests of putative fathers while fostering prompt and final determinations in adoption proceedings.

The categories of fathers to whom notice must be sent under this statute generally further these ends by avoiding the requirement of extensive searches for unidentified or unknown putative fathers. And the putative father registry provides a centralized source, facilitating prompt location of the father. When, however, the father's existence and his assertion of an interest in the child are actually known by the court hearing the adoption petition, the registry is redundant, as are the other sources of ascertaining the existence and location of the father enumerated in section 111-a. Slavish adherence to the "statutory guidelines" in such circumstances cannot have been intended by the Legislature. Indeed, the majority itself recognizes that the court could have required notice under subdivision 3 of section 111 of the Domestic Relations Law. In my view, then, the lack of specific statutory authority for affording an opportunity to be heard to one in petitioner's position does not in any way justify the failure to give notice here.[1] The court's power and responsibility to protect the interests of concerned parties cannot be so easily curtailed or circumvented (cf. *Matter of Linda F. M.*, 52 NY2d 236, 240-241).

The majority here expresses some concern that if this court were to concede error in the lower court's failure to give notice, a court would have to give notice any time it had actual knowledge of the identity of a particular putative father. Unlike the majority, I see nothing startling in such a requirement in circumstances similar to those present here.[2] Nor does such a proposition appear novel in light of

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1. I am unable to reconcile the majority's conclusion that notice properly could have been required in the exercise of discretion under subdivision 3 of section 111 with its assertion that the Family Court Judge, had he required notice, would have acted contrary to the legislative determination not to include a putative father in petitioner's position in the 111-a notice scheme. Having identified a statutory source of authority for giving notice, the majority nonetheless justifies the failure to give notice because of an absence of specific authority.

2. Also unpersuasive is the majority's concern that such a holding might form the basis of an argument that a natural mother's failure to disclose the existence of a putative father would constitute fraudulent concealment of a

(n. contd.)

the pre-*Caban* decisional law recognizing that a putative father has a sufficient interest in his status as such at least to require giving him an opportunity to be heard on the best interest on the child.

The court in this case did not know merely that the biological father was an ascertainable person. The Judge knew that petitioner had undertaken affirmative, formal steps to establish his paternity and obtain visitation. Requiring notice under these circumstances simply does not open the door to notice claims by those out-of-wedlock fathers who have manifested no interest in parental status.

The majority also suggests that petitioner could have protected his rights by taking other steps once he learned the mother's address.[3] It is true that petitioner could have filed notice of intention to claim paternity as provided in section 372-c of the Social Service Law. But prior to March 3, 1979, petitioner, with no knowledge that adoption by the mother's husband was contemplated, had no reason to suspect that his rights were going to be permanently affected. Indeed, after locating the mother and being told to stay away from the family, petitioner, through his attorney, communicated with her on December 12, 1978 in an attempt to arrange visitation. A second attempt was made unsuccessfully in January, 1979. The paternity petition was thereafter filed at the end of that month; respondent mother received notice of the petition on February 22. The adoption proceeding had been commenced on December 21, 1978. To say in the face of the actual knowledge of the Judge that petitioner could have protected his rights by filing a notice of

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material fact. Whatever the motivations of a mother not to disclose the putative father's existence, there may well be significant privacy interests that protect that decision and militate against compelled disclosure (see, generally, Note, 22 William & Mary L Rev, at p 127; Comment, 25 Villanova L Rev, at p 333, n 123; p 335). Those privacy interests simply are not present when the *court* has full knowledge of the putative father's existence and assertion of parental status. Recognizing an obligation on the part of the court to act on facts before it simply does not require recognizing an obligation to disclose on the part of the mother.

3. In his papers before the court, petitioner asserted that respondent mother had always recognized his paternity and had concealed her and Jessica's whereabouts from shortly after Jessica's birth in November, 1976 until August, 1978, at which point he learned that the mother had married.

intent to claim paternity is to require the performance of a meaningless act. The filing of notice only assures that knowledge of the father's existence can be readily ascertained. If it is already known by the court before the adoption order is signed, I am at a loss to discern what added benefit petitioner, or the State, could have obtained by filing such notice.

Nor am I able to characterize as untimely petitioner's conduct after he became aware of the adoption proceeding. Notified on Saturday, March 3, that the adoption proceeding was pending, petitioner telephoned the Family Court Judge on the following Wednesday to inform him that an order to show cause for a stay of the adoption proceeding was to be submitted. The Judge in turn informed petitioner that the adoption order had been signed that morning. Given that the show cause order for the venue motion was returnable on March 12 and that the motion was predicated in part on a claim that the paternity and adoption proceedings should be held together, it borders on the absurd to characterize petitioner's attempt to assert his interest in the adoption proceeding as anything but prompt.

Although the majority opines that any concern for the denigration of petitioner's rights in this case arises only from hindsight in light of *Caban*, it is submitted that the majority's tortuous route would not have been traveled had the specter of *Caban*, which the majority concedes would be applicable in the event of vacatur, not "emerged on the judicial horizon" (pp 429-430).[4] The disagreement with the majority expressed here is not meant to imply that the Family Court Judge acted out of animus toward petitioner or out of any motivation other than what he believed would

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4. Although the majority appears convinced that under *Caban* petitioner automatically would have to be accorded the right to consent to the adoption, the reach of that decision remains unclear. The right to consent may well depend upon the substantiality of the family relationship between the putative father and the child (compare *Caban*, *supra* [consent required], with *Quilloin*, *supra* [consent not required]; see, generally, Note, 22 William & Mary L Rev 85; Comment, 25 Villanova L Rev 317). Given the allegations that the whereabouts of the child were concealed from petitioner and the counterallegation of a lack of interest on petitioner's part, it may be that factual questions in this case would have to be resolved before petitioner's right to consent could be determined.

be in the best interests of Jessica. Well-intentioned motivations notwithstanding, the Family Court's action cannot be termed anything but an abuse of discretion, either in signing the final adoption order or in refusing to vacate that order and reopen the proceedings.[5]

Simple justice requires according petitioner his day in court. Unable to concur in the majority's determination that the Family Court's decision was "the only prudent course of action to have followed in the best interests of Jessica" (p 430), I respectfully dissent.

Judges JASEN, GABRIELLI and MEYER concur with Judge JONES; Chief Judge COOKE dissents and votes to reverse in a separate opinion in which Judges WACHTLER and FUCHSBERG concur.

Order affirmed.

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5. The majority finds petitioner's papers on the motion to vacate insufficient with respect to facts bearing on the best interests of Jessica. An inadequate showing, if such there be, might be relevant where the motion is addressed to the court's discretion. Petitioner, however, seeks vacatur as a matter of right, specifically because he was denied the opportunity to present such facts in the first instance.

APPENDIX B--OPINION OF THE APPELLATE DIVISION, DECEMBER 11, 1980

STATE OF NEW YORK SUPREME COURT

APPELLATE DIVISION THIRD DEPARTMENT

----------X

In the Matter of the Adoption of JESSICA "XX"*.

JONATHAN "YY"*,

Appellant.

LORRAINE "WW"* et al.,

Respondents.

ROBERT ABRAMS, as Attorney General,

Intervenor-Respondent-Appellant.

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Argued, October 7, 1980.

Before: HON. LOUIS M. GREENBLOTT, Justice Presiding,

HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,

Associate Justices.

APPEALS from an order of the Family

Court of Ulster County (Hugh R. Elwyn, J.), entered November 30, 1979, which, inter alia, denied petitioner's motion to open, vacate and/or set aside an order of adoption entered by said court on March 7, 1979.

DAVID J. FREEMAN, for appellant, 175 Main Street, White Plains, New York 10601.

STREIFER, BARNOVITZ & SAMOFF, P.C. (Jay L. Samoff of counsel), for respondents, 9 Main Street, Kingston, New York 12401.

ROBERT ABRAMS, Attorney General (Robert J. Schack and Shirley Adelson Siegel of counsel), as intervenor-respondent-appellant, Two World Trade Center New York, New York 10047.

OPINION OF THE COURT

GREENBLOTT, J.P.

Petitioner seeks to have the adoption order vacated on the ground that he is the natural father of the child and,

as such, should have received notice of the adoption proceeding and been afforded an opportunity to be heard. He claims that section 111-a of the Domestic Relations Law is unconstitutional on the ground that it denied him due process and equal protection of the law, since the statute did not require him to be served with notice of the adoption proceeding.

Petitioner and respondent Lorraine lived together for approximately two years prior to the birth of the child Jessica, the subject of this proceeding. Petitioner claims that Lorraine disappeared, taking the baby with her. In August, 1977, Lorraine married Richard, and a year later respondents commenced adoption proceedings in the Ulster County Family Court. Approximately 26 months after the birth of Jessica, petitioner, although he had never supported the child, filed a paternity petition in the Westchester County Family Court seeking to be adjudicated the father of Jessica. On March 7, 1979 the Ulster County Family Court signed the adoption order and subsequently denied petitioner's motion to vacate the adoption order from which petitioner appeals.

The United States Supreme Court has held that the interests of unwed fathers in the custody of their children are "cognizable and substantial" *(Stanley v Illinois*, 405 US 645, 652). It therefore determined (pp 653-658) that a State could not, consistent with due process requirements, presume that unmarried fathers are unsuitable and neglectful parents and that parental unfitness could only be established on the basis of individualized proof.

The *Stanley* decision was interpreted by the Court of Appeals as requiring that, although the consent of a putative father to the adoption of his child born out of wedlock was not necessary, notice and an opportunity to be heard must be afforded an unwed father before his parental rights may be terminated (see, e.g., *Matter of Malpica-Orsini*, 36 NY2d 568, app dsmd *sub nom. Orsini v Blasi*, 423 US 1042). To provide the constitutional safeguards mandated by the *Stanley* decision, the Legislature enacted section 111-a of the Domestic Relations Law (L 1976, ch 665, eff Jan. 1, 1977) providing that notice of an adoption proceeding must be given in seven situations.

Petitioner does not contend that he falls within any of the seven categories. However, he contends that his commencement of the paternity action in Westchester County was the equivalent of filing a notice of intent to claim paternity. We disagree. Adoption is a creature of statute, and, as such, requires strict observance of the statutory requirements. (See *Matter of Eaton*, 305 NY 162; *Matter of Fitzsimmons v Liuni*, 51 Misc 2d 96, revd on other grounds 26 AD2d 980.) We are constrained, therefore, to conclude that petitioner has failed to comply with the requirements of section 111-a of the Domestic Relations Law. Nor do we find any constitutional infirmity in this section. We add, parenthetically, that petitioner could have insured his right to notice by signing the putative father registry created by section 111-a and section 372-c of the Social Services Law. He failed to do so.

Six weeks after the adoption order was granted, the United States Supreme Court held that section 111 (subd 1, par [c]) (not § 111-a) of the Domestic Relations Law was unconstitutional since it treated unmarried parents differently because of their sex, in violation of the equal protection clause *(Caban v Mohammed*, 441 US 380). Thus, an unwed father, like an unwed mother, may now veto an adoption of his child merely by refusing to give his consent, absent a showing of abandonment, neglect or surrender (see *Matter of Mitchell [Onondaga Dept. of Social Servs.]*, 70 AD2d 367; *Matter of Cecilie Ann T.*, 101 Misc 2d 472; *Matter of Anthony John P.*, 101 Misc 2d 918).

We hold that *Caban* is not entitled to retroactive effect in view of the well-settled legal doctrine that final dispositions should not be disturbed by a subsequent change in the decisional law *(Childs v Childs*, 69 AD2d 406). Petitioner's motion to vacate the adoption order was made nearly two months after the *Caban* decision and approximately three and one-half months after the adoption order became final. We agree with the statement made by Mr. Justice STEVENS in *Caban* (441 US 380, 415-416 [dissenting opn]): "The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial

decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retroactive application of this ruling. See *Chevron Oil Co. v. Huson*, 404 U. S. 97, 106-107. Families that include adopted children need have no concern about the probable impact of this case on their familial security."

The order should be affirmed, with costs.

MIKOLL, J. (dissenting). I respectfully dissent.

The purpose of section 111-a of the Domestic Relations Law is to enable persons served under it to present evidence to the court relevant to the best interests of the child (Domestic Relations Law, § 111-a, subd 3). The legislation was enacted in answer to the decision of *Stanley v Illinois* (405 US 645) which recognized the interests of putative fathers in retaining custody of their children. The courts of this State have interpreted *Stanley* as requiring that notice and an opportunity to be heard to be afforded an unwed father before his parental rights could be terminated (see, e.g., *Matter of Malpica-Orsini*, 36 NY2d 568, app dsmd *sub nom. Orsini v Blasi*, 423 US 1042).

In the instant case, the Family Court held that petitioner did not fall within the categories of putative fathers enumerated in section 111-a of the Domestic Relations Law and, therefore, was not entitled to the notice prescribed by it. Under section 111-a, a notice of adoption proceedings would be required to be served on "any person who has timely filed an unrevoked notice of intent to claim paternity" (Domestic Relations Law, § 111-a, subd 2, par [c]). Here, the petitioner did not merely indicate an intent to claim paternity, but, he has formally acknowledged his paternity in a judicial proceeding by filing a petition pursuant to section 522 of the Family Court Act. The reading given the statute by the Family Court was, in my opinion, too literal. Admittedly, the petitioner did not file a notice of intent to claim paternity. He went considerably further. He was certainly a readily identifiable person under the spirit and intent of the statute. His status was terminated in

these proceedings in a manner at odds with the intent of the statute and in a manner inconsistent with due process.

The actions of the Family Court are difficult to fathom. The Judge who was hearing the adoption proceeding had also signed the show cause order to change the venue of the paternity proceeding to his county. He knew then that petitioner was acknowledging paternity of the child whose adoption was then pending before him. Under such circumstances, petitioner should have been notified of the pending adoption proceedings and allowed to intervene.

I conclude that the adoption order should be vacated and a proceeding held to determine petitioner's status as the natural father and, if so adjudicated, he should be allowed access to the records of the adoption proceeding.

SWEENEY, KANE and MAIN, JJ., concur with GREENBLOTT, J. P.; MIKOLL, J., dissents and votes to vacate the order in a separate opinion.

Order affirmed, with costs.

New York Supreme Court

Appellate Division, Third Department

Box 7288, Capitol Station

Albany, N.Y. 12224

John J. O'Brien
Clerk

518-474-3609

December 16, 1980

John T. Fitzpatrick, Esq.
State Law Reporter
Court of Appeals Hall
Albany, New York 12207

Re: #37318 - In the Matter of the Adoption of Jessica "XX"

Dear Mr. Fitzpatrick:

A decision and opinion in the above entitled case were rendered on December 11, 1980.

Would you kindly note that the following sentence in the second paragraph on page 3 has been changed to read as follows:

> On March 7, 1979 the Ulster County Family Court signed the

adoption order and subsequently denied petitioner's motion to vacate the adoption order from which petitioner appeals.

Very truly yours,

/s/ John J. O'Brien

Clerk

JO'B:cs

cc: David J. Freeman, Esq.

Streifer, Barnovitz & Samoff, P.C.
ATTN: Jay L. Samoff, Esq.

Hon. Robert Abrams, Attorney General
ATTN: Robert J. Schack, Asst. Attorney General

Francis T. Murray, Esq.

APPENDIX C--OPINION OF THE FAMILY COURT ULSTER COUNTY, NOVEMBER 26, 1979.

STATE OF NEW YORK

FAMILY COURT : ULSTER COUNTY

In the Matter of the Adoption
by LORRAINE and RICHARD ROBERTSON

Docket No. A-47-78.

of JESSICA MARTZ,

July 17, 1979.

DAVID J. FREEMAN, Attorney for Jonathan Lehr.

JAY L. SAMOFF, Attorney for Lorraine Robertson and Richard N. Robertson.

ROBERT ABRAMS, (ROBERT J. SCHACK, Assistant Attorney General, of Counsel) Attorney General, State of New York.

OPINION OF THE COURT

HUGH R. ELWYN, J.

Jonathan Lehr, the putative father of a child named Jessica, who is the subject of this adoption proceeding, has by an order to show cause signed by a

Family Court Judge of Westchester County moved for an order pursuant to section 114 of the Domestic Relations Law opening, vacating and/or setting aside an order of adoption entered in the Ulster County Family Court on March 7, 1979 on the ground of fraud and other sufficient cause and upon the grounds that sections 111 and 111-a of the Domestic Relations Law are unconstitutional in that they deny due process of law and equal protection of the law; and for a further order pursuant to section 114 of the Domestic Relations Law permitting the movant to inspect the sealed records of this court.

CHRONOLOGY OF THE PRIOR LEGAL PROCEEDINGS

On or about December 21, 1978 Richard N. Robertson and Lorraine Robertson, his wife, filed a petition with this court for the adoption by Richard Robertson of Jessica Martz, his wife's natural child who was born out of wedlock on November 9, 1976.

Without notice to Jonathan Lehr, the child's putative father, who did not fall within any of the seven categories of fathers of children born out of wedlock enumerated in section 111-a (subd 2, pars [a]-[g]) of the Domestic Relations Law as persons entitled to notice of an adoption proceeding involving a child born out of wedlock, an adoption hearing was routinely scheduled to be held in this court on January 15, 1979. On that day such a hearing was held at which the only two witnesses were Richard N. Robertson, the adoptive father, and Lorraine Robertson, the child's natural mother, who in accordance with the requirements of section 111 (subd 1, par [c]) of the Domestic Relations Law readily gave her consent to her husband's application for the adoption of her out-of-wedlock child. The inquiry at the hearing was conducted entirely by the court and the sworn testimony of Mr. and Mrs. Robertson merely confirmed the contents of their petition which contained all of the information required to be included by subdivision 2 of section 112 of the Domestic Relations Law. In addition thereto, the natural mother submitted an affidavit in which she confirmed that there was no person who was entitled to notice of the proceedings pursuant to section 111-a of the Domestic Relations Law.

At the conclusion of the hearing the court routinely made an order designating the Ulster County Department of Social Services as the authorized agency to make the investigation required by section 116 of the Domestic Relations Law. Such an investigation was conducted by the Ulster County Department of Social Services and a written report of their investigation was received by the court on February 26, 1979. The report of investigation concerned itself with the natural mother and the adoptive father and the child; no contact was made with the putative father who is not identified in the report.

Although unknown to this court at the time, it now appears that on January 30, 1979, Jonathan Lehr, the putative father, filed in the Westchester County Family Court a paternity petition seeking to have himself declared to be the father of Jessica and to be awarded reasonable rights of visitation. A summons directed to Lorraine Robertson was issued by the Westchester County Family Court three weeks later on February 21, 1979 and was personally served upon her on February 22, 1979. The following Monday, February 26, counsel for Mrs. Robertson informed the court of the pendency of the West-

chester County Family Court filiation proceeding and on the same day at the behest of counsel for Mrs. Robertson the court signed an order to show cause for a change of venue of the filiation proceeding returnable on March 12, 1979 before the Family Court of Westchester County. It was in this manner and at this time, February 26, 1979, that this court first learned of the putative father's asserted interest in the child, Jessica.

The motion for a change of venue was opposed by the putative father and was denied by the Family Court of Westchester County. Although the court concedes that through having signed an order to show cause for a change of venue it was aware of the pendency of the Westchester County filiation proceeding, the court nevertheless on March 7, 1979 at the behest of counsel for the adoptive parent signed a final order of adoption. On the same day, but after the order of adoption had been signed, counsel for the putative father telephoned the court to request a delay in the adoption proceeding and was informed by the court that his request came too late; the order of adoption had already been signed.

It is important to note that at the date of signing the order of adoption, the adoptive parent had complied with every requirement of article 7 of the Domestic Relations Law; there was no person who qualified as a person entitled to notice of the proceeding under the provisions of section 111-a of the Domestic Relations Law; the court had received the Department of Social Services report of its investigation as required by section 116 of the Domestic Relations Law and their report of the adoptive parent was in all respects favorable. From the information I had before me I was completely satisfied that the best interests of the child would be promoted by approving the adoption. That being the case, the court was of the opinion that it had no alternative but to approve the adoption, for it is provided in section 114 of the Domestic Relations Law that "[i]f satisfied that the best interests of the adoptive child will be promoted thereby the judge or surrogate shall make an order approving the adoption". The language of the statute is mandatory. Aside from knowledge of the putative father's belated assertion of his fatherhood in an independent proceeding in another court[1] months after this proceeding had been

1. The putative father was never a party to the adoption proceeding and never sought to intervene, as he might have done pursuant to CPLR 401, 1012 (subd [a]) and 1013.

commenced, there certainly was no reason known to the court for disapproving the adoption.

Now by order to show cause initiated nearly four months after the adoption order was signed the putative father seeks to vacate the order of adoption because he was not given notice of the proceeding and upon the further ground that both sections 111 and 111-a of the Domestic Relations Law are unconstitutional.

THE PUTATIVE FATHER'S ARGUMENT WITH RESPECT TO LACK OF NOTICE

[1] The putative father concedes that he does not fall within any of the seven categories of putative fathers entitled to notice of an adoption proceeding involving a child born out of wedlock enumerated in section 111-a (subd 1, pars [a]-[g]) of the Domestic Relations Law. He is not named as the father on the child's birth certificate (Domestic Relations Law, § 111-a, subd 2, par [d]), nor has he ever filed a notice of intent to claim paternity of the child with the putative father registry (Domestic Relations Law, § 111-a, subd 2, par [c]). Hence there was no statutory duty on the part of either the petitioner or the court at the time the proceeding was commenced to have given him notice of the proceeding.

The putative father argues, however, that since the mother of the child knew of his identity and that during the pendency of this proceeding and before its consummation with the signing of an order of adoption on March 7, 1979 she acquired actual notice of his asserted claim to the paternity of her child through his institution of a paternity proceeding in the Family Court of Westchester County in which she was named as the respondent, the constructive notice of the putative father's interest in his out-of-wedlock child provided by section 111-a of the Domestic Relations Law became irrelevant.

The court's research has revealed no reported case construing section 111-a of the Domestic Relations Law dealing with the court's responsibility to require a petitioner in an adoption proceeding involving an out-of-wedlock child where the mother has actual notice, as opposed to the constructive notice of a putative father's potential interest in the proceeding provided by section 111-a of the Domestic Relations Law. The question arises whether there may possibly be some valid analogy with the well-settled construction of the real property recording act (Real Property Law, § 291) that one cannot

claim to be a purchaser in good faith and for value if one has actual notice of an asserted legal ownership, interest in or lien upon real property even though the legal instrument which is the basis for the title or right is unrecorded. "[T]he Recording Acts serve only as constructive notice and where actual notice exists lose all pertinence. Real Prop. Law, § 291." *(Reed v Barkley,* 123 Misc 635, 637.)

The validity of this analogy is challenged by counsel for the adoptive father and natural mother who points out that the court's duty to require notice of an adoption proceeding involving an out-of-wedlock child is one imposed by statute (Domestic Relations Law, § 111-a); the putative father here did not qualify as a father entitled to notice under section 111-a and that the court was under no duty to require the petitioner to give a notice not required by the statute. Furthermore, it is pointed out that although known to the Greek and Roman law, adoption was unknown to the common law and exists in this country only by virtue of statute. In this State an adoption can be consummated only under the conditions prescribed by statutory authority and like all statutory proceedings there must be strict observance of the statute *(Matter of Fitzsimmons v Liuni,* 51 Misc 2d 96, 112-113 and cases there cited, revd on other grounds 26 AD2d 980).

As Judge (later Chief Judge) DESMOND observed in *Matter of Eaton* (305 NY 162, 165): "On few questions is decisional law so clear as on this: that adoption, and the abrogration thereof, is, in New York, solely the creature of, and regulated by, statute law."

In this case all provisions of article 7 of the Domestic Relations Law relating to private placement adoptions were strictly complied with; it is not even contended that there were any omissions or shortcuts taken (see, e.g., *Matter of Santacose,* 271 App Div 11). Rather, the putative father's complaint is that there was a failure on the part of the court to do more than the statute required, i.e., require the petitioner to give notice to the putative father of the pendency of this adoption proceeding when it became known to the mother and through her to this court of his interest in the child because of his assertion of parentage in the paternity proceeding he had instituted in another court.[2] In short, it is

2. The mother acknowledges being served with a summons issued in the paternity proceeding in Westchester County Family Court on February 22, 1979. The order of adoption was signed on March 7, 1979.

charged that the court was remiss in its duty in not requiring the petitioning adoptive parent to do more than the statute (Domestic Relations Law, § 111-a) required.

In support of this contention, counsel for the putative father cites *Matter of Lord* (28 AD2d 1203) in which on a motion similar to the instant one the Appellate Division (4th Dept) reversed a Family Court order which had denied a motion to vacate an order of adoption. Although the appellate court in *Lord (supra,* p 1203) thought "it * * * inconceivable that the court would not have directed that notice be given to all interested parties beyond that required by the bare necessities of the statute" where there had been a failure to disclose in an open manner certain material facts as to the previous custody of the child, the factual situation in *Lord (supra)* is readily distinguishable from the facts of the present case.

In *Lord (supra)* there was a considerable factual dispute as to who had the custody of the child. Any person having lawful custody of the adoptive child is a necessary party to an adoption proceeding (Domestic Relations Law, § 111, subd 1, par [d]). If the appellant was correct on the issue of who had the lawful custody of the child, then by reason of the statute he was entitled to have been put on notice of the adoption proceeding. In this case, assuming *arguendo,* the truth of all of the putative father's factual assertions, he still is not entitled to notice under section 111-a of the Domestic Relations Law. Accordingly, I do not find the decision in *Matter of Lord (supra)* apposite to the situation presented on this motion.

Moreover, the court notes that *Matter of Lord (supra)* was decided in 1967, some nine years before the enactment of section 111-a of the Domestic Relations Law in 1976 and has nothing to do with the problem section 111-a of the Domestic Relations Law was enacted to meet. This statute, as is noted in the discussion of its constitutionality, was enacted in direct response to the United States Supreme Court decision in *Stanley v Illinois* (405 US 645) in order to remove any doubt as to which putative fathers were entitled to notice of an adoption proceeding involving an out-of-wedlock child. The statute does not purport to give the court any discretion to add to the list.

Jonathan Lehr's right to notice of this adoption proceeding, if any, has to be founded not upon section 111-a of the Domestic Relations Law, but upon subdivision 3 of section 111 of the Domestic Relations Law which does purport to give the

court discretion in the matter of who is entitled to notice and an opportunity to be heard in an adoption proceeding. Subdivision 3 of section 111 of the Domestic Relations Law provides that: "Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded * * * to any other parent whose consent to adoption may not be required pursuant to subdivision two [of section 111 of the Domestic Relations Law], if the judge or surrogate so orders".

It should be noted that subdivision 3 of section 111 of the Domestic Relations Law has been a part of the law of this State since the enactment of section 111 of the Domestic Relations Law in 1938, a period of more than 40 years. In other words, the discretionary authority given to the Judge or Surrogate to require notice of an adoption proceeding to be given "to any other parent whose consent to adoption may not be required" (Domestic Relations Law, § 111, subd 3) antedated the United States Supreme Court decision in *Stanley v Illinois* (405 US 645, *supra)* and the later enactment in 1976 of section 111-a of the Domestic Relations Law by almost 40 years. Although the phrase "any other parent whose consent to adoption may not be required" could be construed broadly enough to include the father of an out-of-wedlock child as well as a father whose consent might not be required by reason of abandonment, surrender or loss of civil rights or mental illness (Domestic Relations Law, § 111, subd 2), it could hardly have been the intention of the Legislature to require such a notice to be given to a father whose consent was not required by New York Law (Domestic Relations Law, § 111, subd 1, par [c]) and whose consent was not constitutionally required *(Matter of Malpica-Orsini,* 36 NY2d 568) until April 24, 1979 when the United States Supreme Court rendered its decision in *Caban v Mohammed* (441 US 380).

At no time prior to this motion did the putative father of the child attempt to intervene in the proceeding as he might have done pursuant to CPLR 401 nor has he ever asked this court to exercise its discretion to give him notice of the proceeding and an opportunity to be heard, which conceivably the court might have done under the broad language of subdivision 3 of section 111 of the Domestic Relations Law. As a practical matter, however, the court can perceive of no reason why it should, on its own motion, have exercised its discretion to require that a notice of a proposed adoption and

an opportunity to be heard be given to a man claiming to be the father of an out-of-wedlock child who did not qualify as a person entitled to notice of the proceeding under section 111-a of the Domestic Relations Law and whose consent to the adoption was not legally required (Domestic Relations Law, § 111, subd 1, par [c]; *Matter of Malpica-Orsini*, 36 NY2d 568, *supra*). Unless and until an appellate court holds that this court abused its discretion in not requiring that notice of the adoption proceeding be given to the putative father in this case under the broad provisions of subdivision 3 of section 111 of the Domestic Relations Law when not required under the more specific statute governing notice to out-of-wedlock fathers (Domestic Relations Law, § 111-a) this court adheres to its initial judgment—that no notice of this adoption proceeding was required to be given to a putative father who did not qualify under any of the provisions of section 111-a of the Domestic Relations Law.

THE RESPONSIBILITY OF THE MOTHER AND ADOPTIVE FATHER TO THE PUTATIVE FATHER

[2] From the chronology of events heretofore recited it is clear that the mother, Lorraine Robertson, knew of the putative father's assertion, through legal proceedings, of his claim to be the father of her child nearly two weeks before the adoption order was signed.[3] Since the mother must have known of his claim to the fatherhood of her child since birth, or perhaps even from the moment of conception, the question arises—of what legal significance is it that she was apprised some two weeks before the adoption of her child was finalized, of the putative father's decision to seek a judicial determination of a fact she must have known all along? The court acknowledges that it learned of the pendency of the Westchester County filiation proceeding on February 26, 1979, at the behest of counsel for the mother, it signed an order to show cause for a change of venue.[4] What is not clear from the motion papers, which are entirely silent on this point, is

3. The mother acknowledges being served with a summons in the paternity proceeding in Westchester County Family Court on February 22, 1979. The order of adoption was signed on March 7, 1979.

4. The court never had any direct communication from counsel for the putative father relative to his interest in the pending proceeding until the morning of March 7, 1979 when it received a telephone call from counsel asking that the adoption proceeding be stayed. The order of adoption had, however, already been signed.

whether or not Mrs. Robertson's husband, the adoptive parent, had any actual or imputed knowledge of the putative father's claim to the fatherhood of the child.

Although much is made of the fact that the mother had actual notice of the putative father's claim to the parentage of her child before the adoption proceeding was consummated, the only significant inquiry is whether or not the adoptive father knew of the asserted claim for he is the petitioner and the only real party in interest.[5] In the absence of any proof of actual notice, the basis for imputing such knowledge to him its tenuous at best. There is no claim of any agency existing between husband and wife to form the basis of imputing the knowledge of the agent to the principal. Any basis for the imputation of the wife's knowledge to the husband has to rest upon the marital relationship alone which is wholly insufficient.

It is extremely doubtful, however, whether the adoptive father, the only real *party* in interest in this proceeding, can be charged with the legal consequences of having actual or imputed knowledge of the putative father's claim which is asserted in another court in a litigation to which he is not a party. Although the rights of putative fathers have recently been greatly expanded through recent decisions of the United States Supreme Court (see, e.g., *Stanley v Illinois*, 405 US 645, *supra; Caban v Mohammed*, 441 US 380, *supra)* and by statute (see recent amdt to Family Ct Act, § 522, L 1976, ch 665, § 6, eff Jan. 1, 1977) permitting fathers as well as mothers to institute paternity proceedings and which was utilized in this case, it still must be remembered that the real purpose of a paternity proceeding is to enforce the putative father's financial responsibility for the support of the child he has fathered. The mother's husband is neither a proper nor necessary party to the proceeding and is in no way bound by the result. In this connection it may be well to recall the language of the Court of Appeals in *Commissioner of Public Welfare of City of N. Y. v Koehler* (284 NY 260, 266-267) where the court said: "Paternity proceedings are brought to enforce a statutory duty

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5. The mother, although named in the papers on file in this proceeding as a petitioner along with her husband and referred to in the order as the "adoptive mother", is not really a party to this proceeding. Her role in the matter is confined to giving her consent to the adoption by her husband of her out-of-wedlock child as she is required to do by section 111 (subd 1, par [c]) of the Domestic Relations Law. She cannot be transformed from a natural mother to an adoptive mother by some legal alchemy peculiar to an adoption proceeding.

imposed upon the father of a natural child to whom the father at common law owed no duty. *(People ex rel. Lawton v. Snell,* 216 N. Y. 527.) * * * The child is not a necessary party to the proceedings nor is the husband of the mother. The order made in such a proceeding does not constitute an adjudication binding on them or persons claiming through or under them that the child is or is not the legitimate offspring of married parents. An order adjudging that some person other than the mother's husband is the father of the child and ordering him to provide for its support is, it is plain, not a binding adjudication of illegitimacy. It does not establish the status of the child nor would it be competent evidence to establish illegitimacy in any proceeding to which others are parties." (See, also, *Matter of Salvatore S. v Anthony S.,* 58 AD2d 867; cf. *Matter of Commissioner of Social Servs. of City of N. Y. v Lazaro F.,* 99 Misc 2d 408.)

If the mother's husband, the adoptive parent here, is in no way bound by any adjudication that might be made in the putative father's paternity proceeding, it is difficult to see how he can be charged with the legal consequences of knowledge, actual or imputed, of the putative father's asserted claim to fatherhood of a child which has never even been adjudicated. In short, it seems to me that the adoptive father's knowledge, if any, of the putative father's claim asserted by way of the Westchester County filiation proceeding is without legal significance. The same is true for the mother's knowledge of the putative father's asserted claim to be the father of her child, for she cannot be charged with any legal duty beyond that of complying with the law of the State of New York as embodied in its statutes which, under the circumstances of this case, did not require the giving of any notice of the proceeding to the putative father. In sum, it seems to me that since the statute (Domestic Relations Law, § 111-a) did not require any notice to be given of this adoption proceeding that both the mother or the adoptive father's knowledge of the putative father's claim to the parentage of this child is irrelevant and without legal significance. That being the case neither the mother nor the adoptive father can be charged with committing any fraud upon the court for failing to do that which the law clearly did not require them to do.

While the court does have jurisdiction to "open, vacate or set aside [an] order of adoption for fraud, newly discovered evidence or other sufficient cause" (Domestic Relations Law,

§ 114; *Matter of Natural Parents of "Nicky" v Dumpson*, 81 Misc 2d 132, 141), "the fraud which will suffice to vacate an order or judgment must be fraud in the very means by which the judgment was procured (*Fuhrmann v. Fanroth*, 254 N. Y. 479). 'The fraud must relate to matters other than the issues which could have been resolved in the action wherein the judgment was obtained and must be a fraud upon the court as distinguished from fraud between the parties.' (*J. J. Miller Constr. Co. v. Berlanti Constr. Co.*, 197 N. Y. S. 2d 818, 819-820; see, also, *Matter of Brundage*, 137 N. Y. S. 2d 703, 710.)" (*Matter of Anonymous*, 29 Misc 2d 580, 582; see, also, *Matter of Natural Parents of "Nicky" v Dumpson*, 81 Misc 2d 132, 141, 143, *supra*.)

The putative father may feel himself to be aggrieved by the mother's failure to disclose to the court the full extent of their relationship, but since such information is irrelevant to the court's decision to approve this adoption as being in the best interests of the child, the mother's withholding of this information does not constitute a fraud upon the court. The mother's failure to disclose to the court the nature and extent of her relationship with the putative father furnishes no legal ground for vacating and setting aside this order of adoption. The motion to vacate the order of adoption for the fraud of the mother is denied.

A consummated adoption is unassailable. (*People ex rel. McGaffin v Family & Children's Serv. of Albany*, 2 Misc 2d 608, mod 3 AD2d 633; see, also, *McGaffin v Family & Children's Serv. of Albany*, 6 Misc 2d 776, citing *People ex rel. Grament v Free Synagogue Child Adoption Committee*, 194 Misc 332, 336, mot to dismiss app granted 275 App Div 823.)

EXTENT OF THE COURT'S OBLIGATION TO REQUIRE AN INVESTIGATION INTO THE SOCIAL HISTORY OF THE MOTHER AND THE PUTATIVE FATHER

[3] The attorney for the putative father contends that before approving this adoption the court should have required the Department of Social Services to have made a more thorough investigation than it did and that had such a thorough and in-depth investigation been made certain derogatory information regarding the mother's emotional instability would have been revealed which might have had a critical impact on the court's decision. Moreover, such an investigation, if had, would, it is said, have revealed the details of the putative

father's relationship with the child's mother and demonstrated his interest in the child. In short, the attorney for the putative father seems to be charging the court with a failure to discharge its full responsibility under the provisions of section 116 of the Domestic Relations Law.

In answer to this contention it should first be noted that although the investigation required by subdivision 3 of section 116 of the Domestic Relations Law is by the wording of the statute not limited to securing information concerning the areas delineated in section 116 (subd 3, pars [a]-[f]) of the Domestic Relations Law, all of the areas the investigation is required to cover concern the adoptive parents and the adoptive child. No mention at all is made of the natural mother or the putative father of a child born out of wedlock.

Quite frankly, even if a thorough and complete investigation into the illicit relationship between the mother and the putative father which resulted in the conception and birth of this child were made and certain unfavorable information concerning the mother's mental and emotional instability were revealed, it is difficult to see how such information, no matter how derogatory, could in any way be significant or even relevant to the court's decision as to whether or not the stepfather's application for the adoption of this child should have been approved or disapproved. In spite of anything the investigation might have revealed about the child's mother, she would still have remained the child's mother, for better or for worse. Her only role in the adoption proceeding, as I see it, is for her to decide whether to grant or withhold her consent to the adoption of her out-of-wedlock child. Without her consent the adoption cannot take place (Domestic Relations Law, § 111, subd 1, par [c]). With it, the adoption may be approved if the court is satisfied that it is in the child's best interest to do so (Domestic Relations Law, § 114). It is with the character and fitness of the adoptive parent that the court is primarily concerned. The illicit love affair between the mother and the putative father which resulted in the conception and birth of the child is, or should be, of little concern to the court.

CONSTITUTIONALITY OF SECTION 111 OF THE DOMESTIC RELATIONS LAW

[4] The United States Supreme Court decision in *Caban v Mohammed* (441 US 380, *supra*), overruling the New York

Court of Appeals decision in *Malpica-Orsini* (36 NY2d 568, *supra)* has declared section 111 of Domestic Relations Law, insofar as it requires the consent of only the mother of an out-of-wedlock child to its adoption, unconstitutional. For this court any question as to the constitutionality of section 111 of the Domestic Relations Law is foreclosed by the decision of the United States Supreme Court.

CONSTITUTIONALITY OF SECTION 111-A OF THE DOMESTIC RELATIONS LAW

[5] Because section 111-a of the Domestic Relations Law, which was enacted by the New York State Legislature in response to the United States Supreme Court decision in *Stanley v Illinois* (405 US 645, *supra),* requires that notice of an adoption proceeding involving an out-of-wedlock child be given to seven enumerated categories of putative fathers, but does not require that a notice of the proceeding be given to *all* putative fathers, it is claimed that the statute discriminates against some putative fathers including the father of Jessica, thereby making an arbitrary and hence invalid classification of putative fathers which has denied Jonathan Lehr due process and the equal protection of the law.

The contention will not withstand analysis and is without merit. Legislative classification does not render a statute unconstitutional provided the classification is rational and reasonable and not purely arbitrary and is related to a legitimate state function. "It is fundamental, of course, that the Legislature may classify persons for purposes of legislation without infringement of the equal protection guarantee and that its discretion in this regard is broad and will not be disturbed if any state of facts can reasonably be conceived to sustain its classification *(Matter of 436 W. 34th St. Corp. v. McGoldrick,* 288 N. Y. 346, 350, mot. for rearg. den. 289 N. Y. 673; *Shielcrawt v. Moffett,* 49 N. Y. S. 2d 64, 76, affd. 268 App. Div. 352, revd. on other grounds 294 N. Y. 180, mot. for rearg. den. 294 N. Y. 840; *New York R. T. Corp. v. City of New York,* 303 U. S. 573) or even if the classification be fairly debatable *(Matter of Presnell v. Leslie,* 3 N. Y. 2d 384, 390, mot. for rearg. den. 4 N. Y. 2d 1046), provided only it shall not be palpably arbitrary *(New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63)." *(Matter of Dorn "HH" v Lawrence "II",* 31 NY2d 154, 158, app dsmd 409 US 1121.)

In its report to the Governor and the Legislature of the

State of New York, dated October, 1976 the Temporary State Commission on Child Welfare of which Senator Joseph R. Pisani was chairman, explains the need for legislation to dispel the confusion arising from the absence of clear statutory guidelines in the wake of the United States Supreme Court decision in *Stanley v Illinois* (405 US 645, *supra)* and the New York Court of Appeals decision in *Matter of Malpica-Orsini* (36 NY2d 568, app dsmd by the US Supreme Ct "for want of substantial federal question" 423 US 1042, *supra).* The commission explains the purpose of section 111-a of the Domestic Relations Law (L 1976, ch 665) as follows:

"This measure will dispel uncertainties by providing clear constitutional statutory guidelines for notice to fathers of out-of-wedlock children. It will establish a desired finality in adoption proceedings and will provide an expeditious method for child placement agencies of identifying those fathers who are entitled to notice through the creation of a registry of such fathers within the State Department of Social Services. Conversely, the bill will afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to be notified and have an opportunity to be heard. It will also obviate an existing disparity of Appellate Division decisions by permitting such fathers to be petitioners in paternity proceedings.

"The measure is intended to codify the minimum protections for the putative father which *Stanley* would require. In so doing it reflects policy decisions to (a) codify constitutional requirements, (b) clearly establish, as early as possible in a child's life, the rights, interests and obligations of all parties; (c) facilitate prompt planning for the future of the child and permanence of his status; and (d) through the foregoing, promote the best interests of children."

The memorandum in support of the bill to add new sections 384-c and 372-c to the Social Services Law and a new section 111-a to the Domestic Relations Law and amending section 254 of the Judiciary Law and numerous sections of article 5 of the Family Court Act points out that despite the Court of Appeals decision in *Matter of Malpica-Orsini (supra),* "there still exists uncertainty as to the significance of the *Stanley* decision with respect to: (a) which fathers of out-of-wedlock children are entitled to notice; (b) in which proceedings; (c) what sort of search, if any, is required in order to ascertain the identity and location of putative fathers. *This bill would*

dispel uncertainties by providing clear constitutional statutory guidelines for notice to putative fathers". (NY Legis Ann, 1976, p 258; emphasis supplied.) In addition, "[i]t would establish much desired finality in adoption proceedings, and would provide an expeditious method for child placement agencies to ascertain those fathers who are entitled to notice. Conversely, the bill would afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to notice and an opportunity to be heard" (NY Legis Ann, 1976, p 258).

In view of this legislative history of section 111-a of the Domestic Relations Law[6] it is clear to this court that the State of New York had a legitimate State interest in enacting section 111-a of the Domestic Relations Law and in establishing a putative father registry (Social Services Law, § 372-c); that its classification of putative fathers is rational and reasonable and clearly is not palpably arbitrary. I therefore find no unconstitutional infirmity in the statute.

Even if this court had any serious doubt as to the constitutionality of section 111-a of the Domestic Relations Law, which it does not, there are at least three additional reasons why this court, a court of first instance, should not find the statute unconstitutional.

First, "It is a cardinal tenet of our law that constitutional questions should not be reached unless there is need for their determination to resolve the issue at hand and the question is squarely presented *(Comiskey v Arlen,* 43 NY2d 696; *Matter of Peters v New York City Housing Auth.,* 307 NY 519; *Anti-Fascist Committee v McGrath,* 341 US 123)." *(Matter of Dora P.,* 68 AD2d 719, 729). Here as in *Dora P. (supra),* no such need exists, nor, indeed is the issue presented for even if the court were gratuitously to find section 111-a of the Domestic Relations Law unconstitutional the putative father in this case would not benefit from such a finding. This court will not make the error of reaching out to come to grips with a problem which is not before it (see *Matter of Dora P., supra,* pp 729-730).

Secondly, there is the matter of standing. The putative father in this case does not bring himself within any of the classifications of putative fathers who are affected by the

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6. The court acknowledges its indebtedness to the office of the New York State Attorney-General for supplying a complete legislative history of section 111-a of the Domestic Relations Law.

statute. "The constitutionality of a statute is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application. * * * It is firmly established that the constitutionality of a statute may not be attacked by one whose rights are not, or are not about to be, adversely affected by the operation of the statute. * * * To raise the question he must show that the alleged unconstitutional feature of the statute injures him, and so operates as to deprive him of a constitutional right. * * * It is, of course, a prerequisite that he establish in himself the claimed right which is alleged to be infringed. * * * A person ordinarily is precluded from challenging the constitutionality of statutes invoking the rights of others. * * * It must affirmatively appear that the person attacking the statute comes within the class of persons affected by it." *(United States v Herrera,* 584 F2d 1137, 1148.)

As in *Herrera (supra)* the putative father of this child thus lacks standing to attack the statute vicariously by asserting grounds not personal to him, since he does not bring himself within any of the classes of putative fathers affected by the statute. The fact that he is omitted from its coverage does not deny to him the equal protection of the law.

Finally, a finding of unconstitutionality should not be lightly undertaken by courts of first instance. "A statute should not ordinarily be set aside as unconstitutional by a court of original jurisdiction unless such conclusion is inescapable. Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the act is apparent on its face." (McKinney's Cons Laws of NY, Book 1, Statutes, § 150, and authorities there cited; see, e.g., *Comiskey v Arlen,* 55 AD2d 304, affd 43 NY2d 696; *Bohling v Corsi,* 204 Misc 778, 783; affd 306 NY 815.) The tendency is to leave such questions to appellate tribunals *(City of New Rochelle v Echo Bay Waterfront Corp.,* 182 Misc 176, 177, affd 268 App Div 182, affd 294 NY 678). Even intermediate appellate courts sometimes defer to higher appellate courts *(Matter of Excelsior Pictures Corp. v Regents of Univ. of State of N. Y.,* 2 AD2d 941). "There is a strong presumption that a statute duly enacted by the Legislature is constitutional" *(People v Pagnotta,* 25 NY2d 333, 337).

Consequently, although this court is of the opinion that the Legislature's classification of those putative fathers entitled to

notice of an adoption proceeding affecting out-of-wedlock children into seven classes does not deny to Jonathan Lehr the equal protection of the laws, the court for the reasons stated above declines to pass upon the constitutionality of section 111-a of the Domestic Relations Law.

RETROACTIVE APPLICATION OF CABAN V MOHAMMED

[6] The final order of adoption in this matter was signed on March 7, 1979. On April 24, 1979 the United States Supreme Court rendered its decision in *Caban v Mohammed* (441 US 380, *supra)* holding section 111 of the Domestic Relations Law unconstitutional insofar as it requires only the mother's consent to the adoption of an out-of-wedlock child.

The majority opinion of the court is silent with respect to its retroactive application. The only clue as the decision's retroactive application is found in the dissenting opinions. In a dissenting opinion, in which Chief Justice BURGER and Mr. Justice REHNQUIST joined, Mr. Justice STEVENS said: "The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retroactive application of this ruling. See *Chevron Oil Co. v. Huson,* 404 U. S. 97, 106-107. Families that include adopted children need have no concern about the probable impact of this case on their familial security." *(Caban v Mohammed, supra,* pp 415-416 [dissenting opn of Mr. Justice STEVENS].)

Mr. Justice STEWART concurred, saying, "I agree that retroactive application of the Court's decision today would work untold harm, and I fully subscribe to Part III of Mr. JUSTICE STEVENS' dissent" *(Caban v Mohammed, supra,* p 401 [dissenting opn of Mr. Justice STEWART]).

Moreover, as noted (p 416) by Mr. Justice STEVENS, "as I read the Court's opinion, the statutes now in effect may be enforced as usual unless 'the adoption of an older child is sought,' *ante,* at 392, and 'the father has established a substantial relationship with the child and [is willing to admit] his paternity.' *Ante,* at 393". Here neither of these conditions prevail.

The *Caban* majority did not object to the statement of the

dissenting Judges with respect to their statements regarding the decision's retroactive application, although they did to other portions of the dissent (see, e.g., 441 US, at p 388, n 6). It may be argued that they thus, at least tacitly, concurred in it.

On the other hand, it is the majority opinion which prevails and constitutes the law of the land. As previously noted the majority opinion is silent on the retroactive application of its decision.

Some clue to the retroactive application of *Caban (supra)* may be gleaned from the history of one case in the light of the New York Court of Appeals decision in *Matter of Malpica-Orsini* (36 NY2d 568, *supra)* which upheld the constitutionality of section 111 of the Domestic Relations Law (May 8, 1975).

In February, 1977 the Appellate Division (2nd Dept) decided *Matter of David A. C.* and *Matter of Denise C.* (56 AD2d 627) and on the authority of *Matter of Malpica-Orsini* (36 NY2d 568, *supra)* affirmed a Surrogate's order of adoption over the objection of a putative father who had not given his consent thereto.

On November 17, 1977 the Court of Appeals dismissed the appeal in *Matter of David A. C.* (43 NY2d 708, 709, reported below 56 AD2d 627) saying: "The purportedly direct and dispositve constitutional issues underlying this appeal are not more than a restatement of questions whose merit has been clearly resolved against appellant's position *(Matter of Malpica-Orsini,* 36 NY2d 568, app dsmd *sub nom. Orsini v Blasi,* 423 US 1042)".

Thereafter, and on April 24, 1979 the United States Supreme Court decided *Caban v Mohammed (supra),* holding section 111 of the Domestic Relations Law unconstitutional insofar as it requires only the consent of a mother to the adoption of an out-of-wedlock child.

On June 12, 1979, the Court of Appeals reversed *Matter of David A. C.* (56 AD2d 627, *supra)* and *Matter of Denise C.* (56 AD2d 627, *supra)* in a one sentence opinion (47 NY2d 880) saying: "Upon reargument, following remand by the United States Supreme Court, order reversed, without costs, orders of adoption vacated, and matters remitted to the Surrogate's Court, Kings County, for further consideration not inconsistent with the opinion of the Supreme Court *(Caban v Mohammed,* 441 US 380, 47 USLW 4462)."

Here is a plain retroactive application of *Caban (supra)* to an adoption which had been consummated without a putative father's consent on the basis of section 111 of the Domestic Relations Law which was subsequently affirmed by the Appellate Division and the Court of Appeals on the authority of *Matter of Malpica-Orsini* (36 NY2d 568, *supra).* Then along comes *Caban (supra)* and the orders of adoption are vacated *(Matter of David A. C.,* 47 NY2d 880, *supra).* The question arises—Where does all of this leave the order of adoption in this case, which was made on March 7, 1979, seven weeks before *Caban* was decided on April 24, 1979?

The Court of Appeals decision in *Matter of David A. C.* and *Matter of Denise C.* (47 NY2d 880, *supra)* is authority for the retroactive application of *Caban (supra).* However, there is one important difference to be noted between the adoptions of *Matter of David A. C.* and *Matter of Denise C. (supra)* and this case. In the reported case, the putative father appears to have been a party to the litigation and to have raised in the Surrogate's Court the question of the constitutionality of section 111 of the Domestic Relations Law as having denied to him the same rights as to the approval of the adoption as were enjoyed by the child's mother, for he was the appellant on all of the appeals. Here the adoption had been consummated without the putative father's participation in the adoption proceeding; only after the adoption has been consummated and the order of adoption signed does he, now that the United States Supreme Court has decided *Caban (supra),* raise the issue of the constitutionality of section 111 of the Domestic Relations Law as applied to him. There is a significant difference between this case and *Matter of David A. C.* and *Matter of Denise C. (supra)* which, in my judgment, warrants a denial of retroactive application of the *Caban* decision *(supra)* to this case. The movant is a "Johnny come lately" whose application simply comes too late.

Moreover, the trauma that would be inflicted upon the child, the mother and the adoptive father in this case argues strongly and persuasively against any retroactive application of the *Caban* decision (441 US 380, *supra)* to this adoption. Accordingly, *Caban* will not be given retroactive application, and the order of adoption will not be vacated because of *Caban (supra).*

INSPECTION OF THE SEALED RECORDS OF THE COURT

"No person shall be allowed access to such sealed records

and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct." (Domestic Relations Law, § 114.)

In light of the decision here made for reasons set forth at length, I do not find that sufficient "good cause" has been shown to permit the putative father, whose "standing" is doubtful and precarious at best, to have access to the sealed records of this consummated adoption. Accordingly, the petitioner's application to be permitted access to the records of this adoption is denied.

APPENDIX D--COPY OF JUDGMENT AND REMITTITUR OF COURT OF APPEALS, DECEMBER 21, 1981.

STATE OF NEW YORK

FAMILY COURT: ULSTER COUNTY

In the Matter of the Adoption of JESSICA MARTZ.

JONATHAN LEHR,

Appellant,

-against-

LORRAINE ROBERTSON and RICHARD N. ROBERTSON,JR.,

Respondents,

-and-

ROBERT ABRAMS, as Attorney General,

Intervenor-Respondent.

JUDGMENT

Family Court Docket No. A-47-78

Ulster County Clerk Index No. 80-3152

Upon the order of remittitur of the Court of Appeals of the State of New York dated November 24, 1981 and the bill of costs annexed hereto, it is

ADJUDGED, that Respondents, Lorraine Robertson and Richard J. Robertson, Jr.,

have judgment against appellant, Jonathan Lehr, whose last known address is 20 North Broadway, White Plains, New York, occupation unknown, in the sum of $332.21 as and for costs and disbursements on appeal, and that respondents have execution therefor.

Dated: December 21, 1981.

_____

Family Court Judge

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

3 No. 565

In the Matter of Jessica "XX"
Jonathan "YY",
Appellant,
Lorraine "WW" &ano.,
Respondents,
Robert Abrams, as Attorney General,
Intervenor-Respondent.

The appellant(s) in the above entitled appeal appeared by David J. Freeman, Esq.; the respondent(s) appeared by Streifer, Barnovitz & Samoff, P.C.; and Robert J. Schack, Esq.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Jones, J. All concur except Cooke, Ch.J., who dissents and votes to reverse in an opinion in which Wachtler and Fuchsberg, JJ., concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Family Court, Ulster County
there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa, Clerk
of the Court

Court of Appeals, Clerk's Office, Albany, November 24, 1981.

APPENDIX E NOTICE OF APPEAL
February 8, 1982.

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK
----------X

IN THE MATTER OF THE ADOPTION
BY LORRAINE AND RICHARD N.
ROBERTSON, JR., No.565
of
JESSICA MARTZ

JONATHAN LEHR,

APPELLANT,

-AGAINST-

LORRAINE AND RICHARD N.
ROBERTSON, JR.,

APPELLEES.
----------X

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jonathan Lehr, the Appellant above named, hereby appeals to the Supreme Court of the United States, from the final judgment of the Court of Appeals of the State of New York, entered in this action on November 24, 1982, which judgment af-

firmed the denial of Appellant's application for an order (i) opening, vacating and setting aside the final Order of Adoption entered in these proceedings on March 7, 1979, and to (ii) inspect the sealed records in said Adoption Proceedings, entered in this action on November 24, 1982.

This appeal is taken pursuant to 78 U.S.C. 1257(2).

Dated: February 8, 1982.

David J. Freeman, Esq.
Attorney for Appellant
Jonathan Lehr
175 Main Street
White Plains, N.Y.
10601
914 939 3311

APPENDIX F--STATE STATUTES INVOLVED AS AMENDED LAWS 1980; CHAPTER 575 EFFECTIVE JULY 27, 1980.

DOMESTIC RELATIONS LAW

Section 111. Whose consent required as amended by Chapter 575, L. 1980.*

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

---

*Matter underscored is new; matter in brackets is old law to be omitted. The Statute without underscored or bracketted changes is the law as it stood on March 7, 1979. The statute with the changes is the present law.

(d) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or

authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained

substantial and continuous contact with the child for the purpose of this subdivision.

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

2. The consent shall not be required of a parent or of any other person having

custody of the child:

(a) who evinces an intent to forego his or her pa-ental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of seciton three hundred eighty-four of the social services law, or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental

retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law; or

(f) who has executed an instrument, which shall be irrevocable, denying the paternity of the child or consenting to the other parent's surrender of the child or consent to the child's adoption, such instrument having been executed after conception and acknowledged or proved in the manner required to permit the recording of a deed.

3. Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c)* of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct

* Sic. Should be (b), (c), (d) and (e).

that the consent specified in paragraph (d)** of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consents cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to

** Sic. Should be (f).

the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

Section 111-a. Notice in certain proceedings to fathers of children born out-of-wedlock as amended by Chapter 575, L. 1980*

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent,

* Matter underscored is new; matter in brackets is old law to be omitted. The Statute without underscored or bracketted changes is the law as it stood on March 7, 1979. The statute with the changes is the present law.

when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b.

In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and

there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to

section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law; and

(h) any person who has filed with

the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law.

3. The provisions of this section shall not apply to persons entitled to notice pursuant to section one hundred eleven.

The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

4. Notice under this section shall be given at least twenty days prior to the proceeding by delivery of a copy of the petition and notice to the person. Upon showing to the court, by affidavit or otherwise, on or before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the person's last known address with reasonable effort, notice may be given, without prior court order therefor, at least

twenty days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity pursuant to section three hundred seventy-two-c of the social services law, to the address last entered therein. Notice by publication shall not be required to be given to a person entitled to notice pursuant to the provisions of this section.

5. A person may waive his right to notice under this section by written instrument subscribed by him and acknowledged or proved in the manner required for the execution of a surrender instrument pursuant to section three hundred eighty-four of the social services law.

6. The notice given to persons pursuant to this section shall inform them of the time, date, place and purpose of

the proceeding and shall also apprise such persons that their failure to appear shall constitute a denial of their interest in the child which denial may result, without further notice, in the adoption or other disposition of the custody of the child.

7. No order of adoption and no order of the court pursuant to section one hundred fifteen-b shall be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section but failed to appear, or who waived notice pursuant to subdivision five. Nor shall any order of adoption be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section in any previous proceeding pursuant to section one hundred fifteen-b in which the court determined that the best in-

terests of the child would be served by adoption of the child by the adoptive parents.

APPENDIX G - EXCERPTS FROM AFFIDAVIT OF JAY SAMOFF, ESQ. IN SUPPORT OF CHANGE OF VENUE - MOTION, ULSTER COUNTY FAMILY COURT, February 26, 1979.

P. A-85:

Further, there is presently pending in the Ulster County Family Court an adoption proceeding concerning the same child who is the subject of this paternity proceeding. The adoptice parents in such proceeding are the natural mother and her husband, Richard N. Robertson, Jr. Mr. Robertson resides with the mother and child in Ulster County. Obviously, Mr. Robertson has a very great interest in these proceedings and should be a party thereto.

It is pointed out that the Ulster County adoption proceeding was commenced more than two months ago, in December, 1978. The hearings therein have been completed and all that is left to be done

therein is the final submission of the Ulster County Department of Social Services adoption investigation report and the formal signing of the order of adoption.

Since the Ulster County Family Court will necessarily be reviewing and passing upon the best interests of the child in connection with the adoption proceeding, it would be unjust, inefficient, superfluous, and an otherwise waste of time and money for another court to pass upon the same matter at the same time.

Accordingly, the interest of justice, as well as the convenience of witnesses, will best be served by a removal of this proceeding to Ulster County.

APPENDIX H - EXCERPTS FROM APPELLANT'S PETITION dated June 13,1979

26. That your petitioner respectfully submits that Section 111a of the Domestic Relations Law of the State of New York is unconstitutional in that it denies your petitioner due process under the law. Said statute fails to provide that prior notice of the adoption proceedings be given to your petitioner as the natural father and/or one claiming to be the natural father of the adopted child Jessica. By not receiving such notice, and not being given the opportunity to be heard in such proceedings, your petitioner was denied both procedural and/or substantive due process of law.

27. That your petitioner respectful= ly submits that Section 111a of the Domestic Relations Law of the State of New York is unconstitutional by reason of the fact that it denies your petitioner

equal protection of the law. That said statute arbitrarily and discriminatorily classifies and distinguishes between certain fathers of children born out-of wedlock who are to receive notice of adoption proceedings and other fathers of children born out-of-wedlock who are not entitled to receive notice of adoption proceedings. That to the extent that said statute did not provide that notice be given to your petitioner in these adoption proceedings, it is unconstitutional and denies your petitioner equal protection of the law.

28. That your petitioner respectfully submits that Section 111 and Section 111a of the Domestic Relations Law are unconstitutional as they deny your petitioner substantive due process and/or

10A.

equal protection of the law. That your petitioner's consent as the natural father and/or one claiming to be the natural father of the adopted child Jessica should have been required as a condition precedent to the adoption of Jessica. That the failure of Section 111 and/or Section 111a.3 to require the consent of your petitioner as an unwed father to the adoption of his child while requiring it of all other parents, including without limitation the natural mother Lorraine, is an unnecessary and discriminatory classification and therefore an unconstitutional denial of equal protection of the law to your petitioner. Further, said

10A. It should be noted that by virtue of a U. S. Supreme Court decision dated April 24, 1979 the case of Caban v. Mohammed declared Section 111 of the Domestic Relations Law unconstitutional on the basis that it violates the Equal Protection Clause of the United States Constitution by arbitrarily distinguishing between the rights of unmarried mothers and the rights of unmarried fathers.

statutes, by not requiring your petitioner's consent to an adoption, presume that your petitioner is unfit as a parent and it is submitted that such a presumption, without a hearing as to your petitioner's fitness as a parent, is a denial of due process. In addition, the provision contained in Section 111a.3 of said statute which provides that an unwed father be given notice of adoption proceedings only for the purpose of allowing him to offer evidence relevant to the best interests of the child is a denial of equal protection of the law, and/or due process.

29. That said Sections 111 and 111a of the Domestic Relations Law of the State of New York are unconstitutional in that they deny your petitioner equal protection of the law. Section 111a when read in conjunction with Section 111 require that notice of an adoption pro-

ceeding be given to (1) all married parents and unwed mothers, (since their respective consents are required); and also to (2) a specific class of unwed fathers. Said statutes, however, do not require such notice to be given to all other unwed fathers. That it is submitted that such a classification is discriminatory and arbitrary and denies your petitioner equal protection of the law.

APPENDIX I--EXCERPTS FROM APPELLANT'S BRIEF TO THE COURT OF APPEALS

P.48

POINT III - SECTIONS 111 and 111a OF THE DOMESTIC RELATIONS LAW OF THE STATE OF NEW YORK ARE UNCONSTITUTIONAL AS THEY HAVE RESULTED IN THE DENIAL TO APPELLANT OF HIS CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAWS PURSUANT TO THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The United States Supreme Court, in the case of Stanley v. Ill, 405 U.S. 645, has firmly entrenched in our society the tenet that a putative or unwed father[9]. has such a significant and cognizable interest in his child that he must be afforded all rights due him under the Constitution, including without limitation,

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9. Throughout this brief, the Appellant herein has been referred to as unwed or natural father. While Appellant has not been adjudicated as the natural father, he had filed a paternity proceeding in Westchester County Family Court acknowledging paternity of the infant herein. In addition, he has so acknowledged such paternity in the Record and the same has not been denied by Respondents.

his right to due process and equal protection under the law. As the Court states:

> "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" Kovacs v. Cooper, 336 U.S. 77, 95 (1949)
>
> P.49
>
> (Frankfurter, J. concurring).
>
> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential,..."

Stanley, therefore, determined that an unwed father, putative or adjudicated, of a child born in or out of wedlock,[10] has such a constitutional and significant interest in his child that all proceedings

10. The U. S. Supreme Court in its decisions has indicated a merger of the biological and legal family where constitutional rights are at issue (see Cary v. Louisiana, 391 U.S. (1968); Weber v. Aetna, 406 U.S. 164 (1972).

which sever this relationship must take cognizance of his claim to treatment in accordance with due process of law.

P.69

Caban v. Mohammed and its Aftermath

A question has arisen throughout the lower court decision as well as the decision of the Appellate Division as to whether or not the holding of the U.S. Supreme Court in Caban v. Mohammed, 441 U.S. 380 (1979) and the aftermath Judicial and legislative interpretation of Caban is applicable to this case. It is the Appellant's contention that even without the application of Caban and the aftermath decisions, Section 111a and 111 of the Domestic Relations Law are unconstitutional in that they deny Appellant his due process and equal protection rights under the Fourteenth Amendment under the Constitution of the United States. As will hereafter be shown, however, as a matter of law, this court

is obligated to apply to this case the holding of Caban and its aftermath decisions.

APPENDIX J--EXCERPTS FROM APPELLANT'S BRIEF IN COURT OF APPEALS.

P. 62 If we look at how the New York statutes in question treat the Appellant, it can clearly be seen that he has been denied equal protection. The following classifications are arbitrary:

(1) Section 111a is a statute which relates only to fathers of children born out of wedlock (such as Appellant herein), and treats them differently than all other parents, including unwed mothers of children born out of wedlock. All mothers of children born out of wedlock must receive notice of adoption proceedings while only certain unwed fathers receive notice. In addition, the type and manner of notice given to an unwed father is different than that afforded to all other parents, including unwed mothers.

(2) Section 111a discriminates between unwed fathers, to wit, those who fit into the categories against those who do not. There is no reasonable basis, especially where a readily identifiable father is known to the court, as is the case here.

P.63 (3) Section 111a also treats said unmarried fathers differently in that their participation in adoption proceedings is limited to submitting evidence as to the child's best interests while all other partents, including unwed mothers of children born out of wedlock, participate in adoption proceedings to give their consent.[14].

(4) Section 111 of the Domestic Relations Law excludes unwed fathers of children born out of wedlock from consenting to the adoption while consent is required of all other parents, including unwed mothers of children born out of wedlock.[15].

What are the reasons for such classifications? Why is the unwed father of a child born out of wedlock

---

14. As has been heretofore shown, this violates the due process clause since an unmarried father is entitled to a hearing as to his fitness. See Stanley v. Ill. supra. In view of Caban v. Mohammed, supra, this is also violation of equal protection since an unwed father now must give his consent just as an unwed mother.

15. It should be noted that Section 111 was declared unconstitutional by the U.S. Supreme Court in Caban v. Mohammed, supra.

treated so differently than all other parents, including an unwed mother of a child born out wedlock? The reasons stem from the "archaic" and irrational belief that the material and paternal interests in a child are different. That unwed fathers are inherently unfit, that unwed fathers all abandon children born out of wedlock; that an unwed father is incapable of having a relationship with the child; that all unwed fathers are unknown and not ascertainable. The list can go on and on but all reasons for the classification relate to the presumed unfitness of the unwed father, and the presumed fitness of all other parents, in all cases of adoption. That presumption is no longer tenable and has not been since Stanley, supra. Overbroad generalizations in gender based classifications are no longer acceptable. Maternal and paternal roles are not

invariably different in importance. The child of an unwed father is as illegitimate as the child of an unwed mother. There are "out there" some caring and concerned unwed fathers whose rights must be protected. Appellant is one of these who has shown a persistent effort in searching out his child and attempting to establish a relationship despite the obstacles thrown in his way by the Respondent natural mother.

Joint Appendix

AUG 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

In The Matter of The Adoption of Jessica Martz, a Minor Under the Age of Fourteen Years by
JONATHAN LEHR,

Appellant,

—v.—

LORRAINE ROBERTSON,
RICHARD N. ROBERTSON, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK (Case No. 565)

JOINT APPENDIX

DAVID J. FREEMAN
Attorney for Petitioner-Appellant
175 Main Street
White Plains, New York 10601

STREIFER, BARNOVITZ & SAMOFF, P.C.
Attorneys for Respondents-Appellees
9 Main Street
Kingston, New York 12401

WILLIAM KELLY
County Attorney
County Office Bldg., Fair Street
Kingston, New York 12401

ROBERT ABRAMS
Attorney General
ROBERT J. SCHACK
Assistant Attorney General,
State of New York
Two World Trade Center
New York, New York 10047

APPEAL DOCKETED: March 22, 1982
JURISDICTION POSTPONED: MAY 17, 1982.

(12696A)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982
No. 81-1756

In The Matter of The Adoption of Jessica Martz, a Minor Under the Age of Fourteen Years by

JONATHAN LEHR,

APPELLANT,

v.

LORRAINE ROBERTSON,
RICHARD N. ROBERTSON, et al.,

APPELLEES.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK
(Case No.565)

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* Said Appellant inadvertently omitted Subparagraph (1)(f) from Section 111. Appellant, therefore, has included Section 111 as corrected in this Appendix, beginning at page 267.

CHRONOLOGICAL LIST OF RELEVENT DOCKET ENTRIES:

DATE	EVENT
December 21, 1978	Petition for Adoption filed by Appellees in Family Court, Ulster County.
January 15, 1979	Adoption hearing held, with natural mother giving her consent and submitting affidavit stating that there was no person entitled to notice of the adoption proceedings.
January 30, 1979	Appellant files a paternity petition in Westchester County Family Court in which he acknowledges to be the natural father of Jessica M.
February 22, 1979	Appellee-natural mother receives notice of Appellant's paternity petition.
February 26, 1979	Judge Elwyn of Ulster County Family Court is advised by Appellees' attorney of Appellant's paternity petition. Judge Elwyn signs order to show cause submitted by Appellees' attorney to change venue of paternity proceeding from

DATE	EVENT
February 26, 1979 (continued)	Westchester County to Ulster County, so that both paternity and adoption proceedings can be held together.
March 7, 1979	Order of Adoption signed.
April 5, 1979	Appellees make a motion in Westchester County Family Court to dismiss the paternity petition.
April 23, 1979	Appellant files Notice of Appeal from March 7, 1979 Order of Adoption (J.S.App. A-6)
June 20, 1979	Family Court, Westchester County enters order dismissing paternity petition without prejudice.
June 22, 1979	Appellant after receiving the June 20, 1979 decision of the Family Court, Westchester County brings on, by order to show cause before Ulster County Family Court, a motion to vacate adoption proceedings and for inspection of sealed records.
July 17, 1979	Oral argument by attorneys on aforesaid motion.

DATE	EVENT
November 26, 1979	Judge Elwyn of Family Court renders his written decision denying Appellant's order to show cause.
November 30, 1979	Order appealed from hereon is entered.
December 13, 1979	Date of notice of appeal to Appellate Division filed by Appellant.
November 26, 1980	Opinion of the Appellate Division, Third Dept., affirming lower court decision.
December 29, 1980	Date Notice of Appeal to Court of Appeals filed by Appellant.
November 24, 1981	Opinion of Court of Appeals affirming Appellate Division Decision.

At a Term of the Family Court of the State of New York, held in and for the County of Westchester at White Plains, New York, on the 22nd day of June, 1979.

P R E S E N T :

HON. Vincent Gurahian

Judge.

----------X

In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.

of an adoptive child having the first name of JESSICA, whose full name is contained in the schedule annexed to the petition herein.

----------X

Docket No. A 47-78

ORDER TO SHOW CAUSE

On reading and filing the petition of Jonathan Lehr, verified the 13th day of June, 1979, and the affidavit of Helen Lehr, sworn to the 11th day of June, 1979, and upon the prior proceedings heretofore had herein, let Lorraine Robertson and Richard N. Robertson show

cause before the Family Court of the State of New York held in and for the County of Ulster at Fair Street, Kingston, New York, at a Special Term thereof, to be held on the 17th day of July, 1979 at 11:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made pursuant to Section 114 of the Domestic Relations Law of the State of New York opening, vacating and/or setting aside the Order of Adoption in the above-entitled proceeding entered in the Ulster County Clerk's Office on the 7th day of March, 1979, on the ground of fraud and other sufficient cause, and upon the grounds that Section 111 and Section 111(a) of the Domestic Relations Law of the State of New York are unconstitutional in that they deny due process and equal protection of the law, and why a further order should not be

made pursuant to Section 114 of the Domestic Relations Law of the State of New York, permitting the inspection of the sealed records, order, and any index thereof in the proceeding for the adoption of Jessica, an infant, on the grounds that the natural mother withheld information from the Court and failed to disclose material facts, fraud, and further, upon the ground that Section 111 and Section 111(a) of the Domestic Relations Law of the State of New York are unconstitutional in that they deny due process and equal protection of the law, and for other sufficient cause, together with such other and further relief as to this Court may seem just and proper; and it is further

ORDERED that all answering papers in connection with this order to show cause shall be served by certified or registered mail, return receipt reques-

ted, upon David J. Freeman, Esq., the attorney for the petitioner herein, at 175 Main Street, White Plains, N.Y.10601, at least eight (8) days prior to the return date; and it is further

ORDERED that a true copy of this order and a copy of the papers on which it is granted be served upon the following parties by certified or registered mail, return receipt requested, on or before the 29th day of June, 1979:

Richard N. Robertson, Jr.
Dock Street
Milton, New York

Lorraine Robertson
Dock Street
Milton, New York

The Attorney General of
The State of New York
2 World Trade Center
New York, N.Y.

Streifer, Barnovitz & Samoff,
P.C.
Attorneys for Richard N.
Robertson and Lorraine Robertson
9 Main Street
Kingston, New York 12401

Dated: June 22, 1979.

S/ Vincent Gurahian
Judge of Family Court

STATE OF NEW YORK
FAMILY COURT : COUNTY OF ULSTER
----------X

In the Matter of the Adoption by

LORRAINE ROBERSTON and
RICHARD N. ROBERTSON, JR.

of an adoptive child having the first name of JESSICA, whose full name is contained in the schedule annexed to the petition herein.

----------X

Docket No. A 47-48

PETITION

TO THE FAMILY COURT, STATE OF NEW YORK, ULSTER COUNTY:

The petition of Jonathan Lehr, respectfully alleges the following:

1. That your petitioner is submitting this petition in support of his application to this Court for an order vacating and setting aside the order of adoption heretofore made and entered in this action, dated March 7, 1979, by which order the infant Jessica was adopted by Richard N. Robertson, Jr. and

Lorraine Robertson, and for a further order permitting your petitioner and his attorney, David J. Freeman, Esq., to examine and inspect all of the sealed records, order, any index thereof in connection with the proceedings heretofore had in the above referred to adoption. A copy of said order of adoption is annexed hereto and marked exhibit A.

2. That as will hereinafter be shown, your petitioner is the natural father of the adopted child Jessica.[1] The adoption proceedings herein were conducted in such manner as to deprive your petitioner of his consitutional rights. Further, said adoption proceedings were

1. That your petitioner has not yet been adjudicated to be the father of the adopted child, Jessica, herein; however, petitioner has initiated filiation proceedings in the Family Court, Westchester County, in which he asks the court to declare him the father of said child.

based upon incomplete, inaccurate and limited facts which were submitted to this Court by one of the adoptive parents, to wit, the natural mother, Lorraine Robertson, formerly known as Lorraine Martz (hereinafter referred to as Lorraine). For the Court's edification, your deponent has divided this petition into the following categories:

I. General Statement

II. Legal Background

III. Factual Background

IV. Misrepresentations of Lorraine Robertson

V. Denial of Constitutional Rights

VI. Abuse of Discretion - Family Court, Ulster County

VII. Grounds for Relief Requested

VIII. Conclusion

I. GENERAL STATEMENT

3. Initially, your petitioner would like to point out to the Court that the

basis of this motion is the fact that your petitioner, as the natural father of the adopted child, Jessica, has been denied his consitutional rights to appear, to be heard and to consent in connection with the adoption proceedings by which Jessica was adopted by Lorraine's new husband, Richard N. Robertson, Jr. Also, as will hereinafter be shown, Lorraine methodically and intentionally withheld from this Court facts which, if presented, would have mandated this Court to notify your petitioner of the adoption proceedings and, therefore, permitted him to participate in order that the best interests of the child, Jessica, be served. It will further be shown that the Court, with its own knowledge of certain facts, severely abused its discretion, and further, did not act in the best interests of the child Jessica by ignoring the existence and rights of

your petitioner when, at least in part, the Court was made aware of your petitioner's significant interest in the adoption proceedings. As a result of your petitioner being denied his opportunity to participate in these adoption proceedings, the Court and the investigative agencies which participated in these proceedings were without facts which, if made known to them, might have influenced the final result of the adoption proceedings or may well have instigated further inquiries so as to assure not only that the rights of your petitioner were being protected but also that the best interests of the child were being served.

II LEGAL BACKGROUND

4. That on or about January 31, 1979, your petitioner commenced filiation and visitation proceedings in the Family Court of the State of New York held in

and for the County of Westchester. In said petition, a copy of which is annexed hereto and marked exhibit B, your petitioner requested that a declaration of paternity be issued declaring your petitioner the natural father of the child, Jessica Martz, and further, requesting that petitioner be awarded reasonable visitation rights. That as will hereinafter be shown, said petition was filed by reason of the fact that Lorraine had engaged upon a course of conduct, subsequent to the birth of the child Jessica, which was designed to completely frustrate your petitioner's desire to communicate and visit with Jessica, and which was further designed to exclude your petitioner from making a contribution towards the wellbeing of Jessica.

5. That upon information and belief, a summons, to wit, exhibit B, and

petition, were mailed to Lorraine by the Family Court of Westchester County, and that this summons and petition were received by her on or about February 22, 1979, and that thereafter a preliminary proceeding in the Westchester County Family Court was scheduled for March 12, 1979. That Lorraine has heretofore acknowledged receipt of that petition. That the Court should bear in mind at this time that the Order of Adoption (exhibit A) was not signed by Judge Elwyn of the Family Court of Ulster County until March 7, 1979, a period of more than two (2) weeks after Lorraine knew of the existing paternity petition. It should also be pointed out to the Court that prior to the institution of the above referred to paternity proceeding your petitioner, on two separate occasions, December 12, 1978 and January 8, 1979, had his attorney, David J. Freeman, Esq.,

forward letters to Lorraine, advising her that if no response was forthcoming "...appropriate proceedings would be commenced in the Family Court, Westchester County." Copies of said letters are annexed hereto and are collectively marked as exhibht C.[2] That as will hereinafter be shown, said letters were sent to Lorraine only after many, many months of extensive research efforts which were made by your petitioner to locate the whereabouts of Lorraine and

2. The January 8, 1979 letter was forwarded to Lorraine but the same was refused by her, therefore indicating that she knew of your petitioner's continued interest; however, it is clear that her intent at this time was not to communicate with your petitioner in the hopes that the adoption proceedings which had already been commenced, would be completed without your petitioner's knowledge. A copy of the envelope marked "refused" is annexed to the January 8, 1979 letter and marked exhibit C.

Jessica. It should further be pointed out that no adoption proceedings were commenced by Lorraine and her husband until after they had received the December 12, 1978 letter hereinbefore referred to.[3]

6. That thereafter, the first response which your petitioner received from Lorraine was on March 3, 1979, by way of an order to show cause and supporting affirmation from Lorraine's attorney, requesting a change of venue of the paternity proceedings and staying the paternity proceedings pending a determination of that order to show cause. A copy of that order to show cause and supporting papers is annexed hereto and

3. Upon information and belief, said adoption proceedings were commenced on or about December 14, 1979 by the filing of a petition for adoption, a copy of which is annexed hereto and marked exhibit D.

marked exhibht E. That contained within Lorraine's attorney's affirmation annexed to that order to show cause is a statement that adoption proceedings were begun in December, 1978, in the Ulster County Family Court involving the same child Jessica who was the subject of the paternity proceeding, which was and still is pending in the Westchester County Family Court. That your petitioner had no prior notice of these adoption proceedings until his attorney, David J. Freeman, Esq., was served with the said order to show cause on or about March 3, 1979. Said attorney's affirmation further stated that "...hearings (adoption) therein have been completed and that all that is left to be done is the final submission of the Ulster County Department of Social Services adoption investigation report and the formal signing of the

order of adoption." (emphasis added)

7. That as more fully appears in the letter of your petitioner's attorney, David J. Freeman, Esq. which is also annexed hereto as exhibit H, on March 7, 1979 Mr. Freeman called Judge Elwyn of the Ulster County Family Court to advise the Court of the pending paternity proceeding and to further advise the Court that he would be forthwith forwarding to the said Judge an order to show cause which would request a stay of the adoption proceedings which were pending in Ulster County until the issue of paternity and visitation had been concluded in Westchester County.[4] In that telephone conversation, your petitioner's attorney

4. Judge Elwyn had signed the order to show cause which requested a change of venue for the adoption proceedings and which temporarily stayed the paternity proceedings in Westchester County (see exhibit E).

was advised by Judge Elwyn that the Ulster Family Court had been aware of the paternity petition of your petitioner prior to the entry of the order of adoption, but nevertheless, he did not think that your petitioner had to be notified of the adoption proceedings. He had therefore signed the adoption order on March 7, 1979 without giving your petitioner any notice or the opportunity to be heard. Thus, within the four day period between the service of the order to show cause upon your petitioner's attorney (see paragraph 6 above) and the date the order of adoption had been signed, to wit, March 7, 1979, the final investigation report had been submitted to the Ulster County Family Court, "thoroughly" reviewed, and an order submitted and signed. Certainly the Court should have taken more time to review these very important papers in view of

its knowledge of your petitioner's paternity petition.

8. That thereafter, and by notice of motion dated April 5, 1979, Lorraine, by her attorney, made a motion in the Family Court, Westchester County, to dismiss the paternity petition. Said motion has been submitted to the Family Court, Westchester County, and is awaiting a final decision.

9. That the status of the pending legal proceedings therefore indicate that a final order of adoption was signed on March 7, 1979 (exhibht A) with the Court waiving the statutory six months' residence requirement, and further, with a motion pending in Westchester County Family Court to dismiss the paternity petition. The motion made by Lorraine to have the venue changed was denied by the Family Court of Westchester County.

III. FACTUAL BACKGROUND

10. That your petitioner first met Lorraine in 1971. During the next three years, your petitioner only saw Lorraine a few times. It was not until 1974 that your petitioner first became serious with Lorraine. After a few months of seeing each other in 1974, your petitioner and Lorraine began living together in Westchester County. At that time, Lorraine already had a 1-1/2 yr. old child, to wit, Renee, previously born out-of-wedlock. The putative father of that child had long since abandoned Lorraine and the child, leaving them alone. At the time your petitioner and Lorraine and her daughter Renee began living together, your petitioner was 22 years of age and Lorraine was 19 years of age. Your petitioner lived almost continuously with both Lorraine and her child, Renee, from the fall of 1974 until

November 1976, which was when Jessica, the subject of these adoption proceedings was born. Jessica was born on November 9, 1976.

11. That during the time your petitioner lived with Lorraine and Renee, and prior to the birth of Jessica, to wit, the fall of 1975 until November, 1976, your petitioner was attending school but, at the same time, attempted to provide a home for both Lorraine and Renee. During this period of time, Lorraine was continuously emotionally unstable due to her prior relationships and her prior family life, which had culminated in her leaving the home of her natural parents at the age of sixteen (16). Lorraine also had had substantial problems in school, being "thrown out" of high school and not being able to complete her studies.

12. As noted above, Lorraine was

not emotionally stable during the initial periods of our relationship and while we were living together on two separate occasions, once prior to your petitioner living with her, and once while living with her, Lorraine tried to take her own life. In both instances, hospitalization was required. At one point, Lorraine's emotional state was so severe that she had to be treated as an out-patient at a hospital. At all times while living with Lorraine, your deponent had to take on the role of a father towards Lorraine's child Renee in order that she not be neglected and adversely affected by her mother's emotional instability. Many people who knew our situation acknowledged that your petitioner had greatly helped both Lorraine and especially her child, Renee, during these rather difficult times.

13. Despite these setbacks, your

petitioner had a good relationship with Lorraine and cared for her a great deal and was always willing to take on his assumed responsibility in helping to raise Lorraine's first child, Renee, and supply a sense of security for Lorraine.

14. As noted, Lorraine gave birth to Jessica on November 9, 1976. Both during the period of time of her pregnancy and after the birth of Jessica, Lorraine at all times knew and acknowledged to others that your petitioner was Jessica's natural father. Lorraine acknowledged this fact to members of your petitioner's family (see Helen Lehr's affidavit annexed hereto), as well as to mutual friends of ours, including Dawn and John Sarlo. She also acknowledged this fact to your petitioner's sister and the obstetrician who delivered Jessice, to wit, Dr. D'Amico, of White Plains,

N.Y.[5]. In fact, when Jessica was born, Lorraine had told Dr. D'Amico to send the bill to your petitioner's mother, Helen Lehr. At no time was there ever any question in Lorraine's or your petitioner's mind or for that matter, anyone elses, that Jessica was their child.

To further indicate the fact that your petitioner was Jessica's father, Lorraine on numerous occasions during her pregnancy and thereafter indicated to your petitioner that she had told the Department of Social Services that your petitioner was the father of Jessica.[6].

5. In fact, your petitioner's sister referred Lorraine to her gynecologist, Dr. D'Amico, whom Lorraine used as her obstetrician. Further, it should be pointed out that Lorraine and her friend, Dawn Sarlo attended the same "La Maze" classes and had the same obstetrician, to wit, Dr. D'Amico.

6. Throughout her pregnancy and after Jessica's birth, Lorraine had been receiving welfare payments for the support of both herself and Renee.

She indicated that the said Department of Social Services had threatened to terminate her benefits if she did not disclose the putative father. Lorraine had on numerous occasions during her pregnancy and after the birth of Jessica stated to your petitioner that the Department would soon be commencing proceedings to obtain support payments. Your petitioner never discouraged Lorraine from indicating to the Department that your petitioner was the father, as he always has been ready to assume that responsibility.

15. That subsequent to the birth of Jessica on November 9, 1976, your petitioner herein saw the child for approximately 3 days, visiting with Lorraine and the child each day in the hospital. On each of these visits, your petitioner visited during fathers' visiting hours. At these visits Lorraine never gave any indication that she had not put your pe-

titioner's name as the father on Jessica's birth certificate. Your deponent even spoke with Lorraine's obstetrician at the hospital. After leaving the hospital Lorraine and Renee and Jessica did not come back to live with your petitioner but instead went to live with friends. Lorraine chose not to advise your petitioner as to where she was living. Thereafter, and for a period of approximately six (6) months, Lorraine, without explanation, concealed her whereabouts from your petitioner, and your petitioner was unable to see the child or learn the whereabouts of the child and Lorraine.

16. That after numerous inquiries of Lorraine's friends and further efforts by your petitioner, it was ascertained that Lorraine had moved with Jessica to Milton, New York. Apparently, after Lorraine found out from her friends that your petitioner had been

making inquiries and had finally located her whereabouts, she got in touch with your petitioner and permitted him to visit with Jessica. Thereafter and for four (4) weekends in a row, your petitioner went to visit Lorraine and Jessica and Lorraine's other child, Renee. On a couple of these occasions, Lorraine would not permit your petitioner to see Jessica, although she did let Renee see your petitioner. Lorraine, however, then had a change of heart and refused to let your petitioner continue with the visitations. Lorraine wanted a commitment from your petitioner that he would marry her. Your petitioner, however, could not make such a commitment at that time, either morally or financially, as he was still attending school and was unsure that marriage would be in the best interests of all concerned. Knowing Lorraine's history of emotional and physical problems,

your petitioner did not immediately press for continued visitations at that time. Your petitioner had hoped that Lorraine would not use the child as a bargaining "tool" and would reconsider and permit your petitioner to continue his visits with Jessica and Renee. Regrettably, she did not reconsider. Your petitioner at all times tried to keep an amicable relationship with Lorraine.

17. Within a short period of time thereafter and during the summer of 1977, Lorraine, without notice, moved again, leaving no forwarding address. From that time until August, 1978, your petitioner was unable to locate Lorraine and Jessica although substantial efforts were expended. During this time Lorraine got married. Your petitioner contacted Lorraine's friends and even went to a detective agency but was still unable to locate Lorraine or the child, Jessica. In

August, 1978, your petitioner was finally able to find Lorraine and Jessica in Ulster County where she had married and assumed a different name, to wit, Lorraine Robertson.

18. After learning from her friends that your petitioner had tried to locate her, Lorraine called your petitioner at his mother's and told him to stay away or he would be arrested.[7] It is interesting to note that during the time that Lorraine concealed her whereabouts, she was keeping in touch with your petitioner's mother with whom she had had a very close relationship. While not disclosing her whereabouts to your petitioner's mother, Lorraine would speak

7. Your petitioner on numerous occasions questioned Lorraine's friends as to her whereabouts, and had asked them to tell Lorraine to call your petitioner at his mother's home.

to her about herself and Jessica. She even put Jessica on the phone and told the child to refer to your petitioner's mother as "Grandma!" The Court is once again referred to Helen Lehr's affidavit for further details. During the telephone conversation with Lorraine, your petitioner expressed a strong desire to see Jessica and even reaffirmed his previous desire to give financial assistance if necessary. Your petitioner told Lorraine that since he was now working, he would set up a trust fund for Jessica. Lorraine, however, refused and your petitioner was left with no alternative other than to seek legal advice in the winter of 1978.

19. As can be seen from the foregoing, from the time Jessica was born on November 9, 1976 until August, 1978 (a period of approximately twenty months), your petitioner was unaware of the where-

abouts of Lorraine and Jessica for almost fifteen (15) months of that time, including the last fourteen (14) months. Your petitioner's conduct and efforts in attempting to contact Lorraine clearly show his continued interest in Lorraine and the child, Jessica.

IV. MISREPRESENTATION OF LORRAINE ROBERTSON

20. It is respectfully submitted that had the Ulster County Family Court been aware of the true factual history of this matter as outlined above, your petitioner would have been given notice of the adoption proceedings and would have had the opportunity to have been heard in connection with the adoption of Jessica. Instead of advising the Court as to the true background of both her life and that of the child Jessica, upon information and belief, Lorraine chose to evade many important issues. She chose to withhold

information from the Court. She chose not to disclose material facts relating to the prior conduct of the parties, as well as to your petitioner's efforts to promote the best interests of the child, Jessica. As can clearly be seen from this petition as well as the affidavit of your petitioner's mother, Helen Lehr, Lorraine knew that your petitioner was the father of Jessica, and further, that your petitioner was making every effort to communicate with her and to see the child. Had she told the Court that your petitioner was the father, the Court would have been constrained to give notice to your petitioner of the adoption proceedings. Further, had she told the Court that your petitioner was the father, it would have shown the Court that it was only her bitterness and her emotional state of mind which kept her from placing your petitioner's name on the

birth certificate. Had your petitioner's name been on the birth certificate, as he was led to believe by both the actions and words of Lorraine, the Court once again would have, as a matter of law, been constrained to afford notice to your petitioner. A copy of said birth certificate is annexed hereto and marked exhibit F. As noted previously, your petitioner had been under the impression that the Department of Social Services knew that he was the father of the child. Lorraine had told your petitioner that she had told the Department of Social Services of this and that in all probability the said Department would be coming after your petitioner for support. Thus, your petitioner never had any cause to commence a paternity proceeding or to search out other means of declaring his

paternity.[8]

21. Thus, Lorraine not only made misrepresentations and withheld information, but she committed fraudulent acts by intending to deceive the Court and to deceive the investigative agencies who were directed by this Court to conduct a thorough investigation.

22. The Court is respectfully referred at this point to a reply affidavit of Lorraine, which has previously been submitted to the Family Court of West-

8. Your petitioner had never been aware of any "Putative Father Registry" and even had he been aware, he would have had no cause to register since Lorraine had always acknowledged openly by her words and conduct that your petitioner was Jessica's father. It was not until Lorraine made a motion to dismiss the paternity petition and annexed a copy of the birth certificate that your petitioner saw that his name was not shown as father. The Court should note that this motion to dismiss was made on or about April 5, 1979, or nearly one month after the Order of Adoption was filed.

chester County in connection with the pending motion to dismiss the paternity petition of your petitioner. In that affidavit as well, Lorraine misrepresents facts as well as withholds information from the Family Court of Westchester County which is extremely relevant to both those proceedings and to this application. A copy of this affidavit is annexed hereto and marked exhibit G. Nowhere in her affidavit does Lorraine deny that your petitioner is the father of Jessica. Nowhere in that affidavit is an explanation or an admission by Lorraine of her efforts to conceal her whereabouts from your petitioner, thus making it appear to the Court that your petitioner has never shown any interest in locating her or in seeing Jessica. Nowhere in her affidavit does Lorraine indicate her relationship with Helen Lehr or the fact that she had the child, Jessica, refer to

your petitioner's mother as "Grandma." Instead, she says in her affidavit that there is "...no love lost..." between herself and your petitioner. She only wishes that your petitioner stop trying to follow her around. It appears that Lorraine feels that your deponent's desire to do what is best for the child and to be a part of any adoption proceedings is a form of harassment. Lorraine appears to forget that your deponent has a substantial parental interest in Jessica which she has tried to terminate and has temporarily succeeded in terminating by the adoption proceedings. Had the tables been turned and had Lorraine been the one who now seeks to participate in the adoption proceedings to ascertain what is best for the child, she certainly would not call that harassment, but instead she would call it an assertion of her constitutional and biological rights

as a parent, and that is what your petitioner is asking for.

23. Further, as can be seen from the foregoing, the misrepresentations and omissions of fact made by Lorraine clearly would have made the investigation required by Section 116 of the Domestic Relations Law incomplete.[9] It is submitted, therefore, that without a thorough investigation, this Court was without power to grant an order of adoption.

V. DENIAL OF CONSTITUTIONAL RIGHTS.

24. It is respectfully submitted that not only should the order of adoption be vacated and set aside by reason of the misrepresentations made by Lorraine; but also by reason of the fact

9. Section 116 of the Domestic Relations Law provides that before an adoption is granted, an investigation shall be made which investigation should include but not be limited to the "history of the adoptive parent and adoptive child."

that said adoption proceedings were conducted in such a manner as to deprive your petitioner of his constitutional rights of due process and equal protection of the law.

25. That as stated previously, your petitioner did not receive any notice whatsoever that the within adoption proceedings had been commenced nor was your petitioner given the opportunity to participate in said adoption proceedings. That your petitioner only ascertained that said proceedings were in progress by a statement made in the affidavit of Jay Samoff, Esq., Lorraine's attorney, which was served upon your petitioner's attorney, David J. Freemen, Esq., on or about March 3, 1979.[10] (See paragraph 7th of the within petition). That your peti-

10. Approximately three months after the adoption proceedings were commenced.

tioner respectfully submits that he should have been given notice of the adoption proceedings and should have been made a party.

26. That your petitioner respectfully submits that Section 111a of the Domestic Relations Law of the State of New York is unconstitutional in that it denies your petitioner due process under the law. Said statute fails to provide that prior notice of the adoption proceedings be given to your petitioner as the natural father and/or one claiming to be the natural father of the adopted child Jessica. By not receiving such notice, and not being given the opportunity to be heard in such proceedings, your petitioner was denied both procedural and/or substantive due process of law.

27. That your petitioner respectfully submits that Section 111A of the Domestic Relations Law of the State of

New York is unconstitutional by reason of the fact that it denies your petitioner equal protection of the law. That said statute arbitrarily and discriminatorily classifies and distinguishes between certain fathers of children born out-of-wedlock who are to receive notice of adoption proceedings and other fathers of children born out-of-wedlock who are not entitled to receive notice of adoption proceedings. That to the extent that said statute did not provide that notice be given to your petitioner in these adoption proceedings, it is unconstitutional and denies your petitioner equal protection of the law.

28. That your petitioner respectfully submits that Section 111 and Section 111a of the Domestic Relations Law are unconstitutional as they deny your petitioner substantive due process and/or

equal protection of the law.[10A.] That your petitioner's consent as the natural father and/or one claiming to be the natural father of the adopted child Jessica should have been required as a condition precedent to the adoption of Jessica. That the failure of Section 111 and/or Section 111a(3) to require the consent of your petitioner as an unwed father to the adoption of his child while requiring it of all other parents, including without limitation the natural mother Lorraine, is an unnecessary and discriminatory classification and therefore an unconstitutional denial of equal

10A. It should be noted that by virtue of a U.S. Supreme Court decision dated April 24, 1979, the case of Caban v. Mohammed declared Section 111 of the Domestic Relations Law unconstitutional on the basis that it violates the Equal Protection Clause of the United States Constitution by arbitrarily distinguishing between the rights of unmarried mothers and the rights of unmarried fathers.

protection of the law to your petitioner. Further, said statutes, by not requiring your petitioner's consent to an adoption, presume that your petitioner is unfit as a parent and it is submitted that such a presumption, without a hearing as to your petitioner's fitness as a parent, is a denial of due process. In addition, the provision contained in Section 111a(3) of said statute which provides that an unwed father be given notice of adoption proceedings only for the purpose of allowing him to offer evidence relevant to the best interests of the child is a denial of equal protection of the law, and/or due process.

29. That said Sections 111 and 111a of the Domestic Relations Law of the State of New York are unconstitutional in that they deny your petitioner equal protection of the law. Section 111a when read in conjunction with Section 111 re-

quire that notice of an adoption proceeding be given to (1) all married parents and unwed mothers, (since their respective consents are required); and also to (2) a specific class of unwed fathers. Said statutes, however, do not require such notice to be given to all other unwed fathers. That it is submitted that such a classification is discriminatory and arbitrary and denies your petitioner equal protection of the law.

30. That, apparently, the Ulster County Family Court, in reliance upon Sections 111 and 111a of the Domestic Relations Law, did not deem it necessary to: (1) give your petitioner notice of the adoption proceedings; and (2) permit your petitioner to be heard in said adoption proceedings; and (3) require your petitioner's consent prior to permitting the adoption of Jessica. That since such statutes are unconstitutional, as noted

above, the Ulster County Family Court was without jurisdiction to grant the order of adoption herein.

VI. ABUSE OF DISCRETION - FAMILY COURT, ULSTER COUNTY

31. As previously noted, the Family Court of Ulster County, prior to the entry of the order of adoption on March 7, 1979, had knowledge of the fact that your petitioner had instituted paternity and visitation proceedings with respect to Jessica in the Family Court of Westchester County. The Court's knowledge of this fact is based upon the following:

(a) Judge Elwyn of the Ulster County Family Court signed an order to show cause on February 26, 1979, staying the paternity petition in Westchester County pending a determination as to whether or not the venue of those proceedings should be changed to Ulster

County, where adoption proceedings were taking place. Thus, it appeared at that time at least, which was nine (9) days prior to the time that Judge Elwyn signed the order of adoption, that the Judge was contemplating having both the paternity and adoption proceedings tried in the same Court, to wit, the Ulster County Family Court. However, even before the venue motion was decided by the Family Court of Westchester County, Judge Elwyn signed the order of adoption. It is therefore unclear why in one instance Judge Elwyn signed a stay so that both the adoption and paternity proceedings could be tried in the same venue, and, on the other hand, he signed the order of adoption without the benefit of a decision on the change of venue motion.

(b) That Judge Elwyn admitted to your petitioner's attorney, David J. Freeman, that he did have knowledge of

the paternity proceedings prior to the signing of the final order of adoption. See exhibit H.

(c) In addition, once the Court knew of the interest of your deponent, he should have notified the investigative agency to thoroughly check into your petitioner's paternity petition.[11].

32. Based upon the foregoing, it is respectfully submitted that Judge Elwyn of the Ulster County Family Court acted arbitrarily and abused his discretion in (1) waiving the six-months residency requirement which is set forth in Section 116 of the Domestic Relations Law and (2) in failing to give your petition-

11. While it is impossible to determine what efforts the investigative agency made to determine the interests of your petitioner, it is assumed that no such effort was made based upon the fraudulant misrepresentations of Lorraine, and the failure of the Judge to permit your petitioner to participate in the adoption proceedings.

er notice and an opportunity to intervene in the adoption proceedings.

VII. GROUNDS FOR RELIEF REQUESTED

33. It is clear that the relief which has been requested should in all respects be granted upon any or all of the following grounds:

(a) The order of adoption should be vacated, opened, and/or set aside for any or all of the following reasons:

(1) That Lorraine has fraudulently misrepresented to the Ulster County Family Court facts which bear a substantial relation to the adoption proceedings.

(2) That the Ulster County Family Court lacked jurisdiction to make an order of adoption by reason of the fact that your petitioner was not served with notice of the adoption proceedings

and was not given an opportunity to be heard during the adoption proceedings.

(3) That the Ulster County Family Court lacked jurisdiction to make an order of adoption by reason of the fact that said adoption was granted without the consent of your petitioner who is the natural father of the adopted child, Jessica.

(4) That the Ulster County Family Court was without authority to grant the adoption by reason of the failure to comply with Section 116 of the Domestic Relations Law requiring a full investigation.

(5) That the Ulster County Family Court abused its discretion when it dispensed with the six (6) months' residency requirement as required by Section 116 of the Domestic Relations Law, and further, abused its discretion when it did not permit your petitioner to in-

tervene in the adoption proceedings.

(6) That Section 111 and Section 111a of the Domestic Relations Law of the State of New York are unconstitutional in that the Court's compliance therewith deprived your petitioner of due process of the law and equal protection of the law in violation of the Constitution of the United States.

(b) That the sealed adoption records in the above-captioned proceeding should be opened and your petitioner and his attorney be given access to said records for the purpose of inspecting the same. That the basis for this relief is as follows:

(1) Your petitioner has shown to the Court with reasonable certainty that all material facts were not disclosed during the adoption proceedings and that the failure to disclose those facts, coupled with the fraud perpetra-

ted upon the Court by Lorraine, made the adoption proceedings limited and incomplete.

(2) That the adoption proceedings herein should be vacated and set aside by reason of the grounds set forth in sub-paragraph (a)(1)-(6) of this Paragraph 33.

34. That it is respectfully submitted that the Court may in its discretion in determining this application grant your petitioner the right to inspect the sealed records and stay its determination of the issue of whether or not the Order of Adoption should be opened, vacated, and/or set aside pending inspection. Your petitioner submits that such inspection of the sealed records may produce additional grounds for vacating, opening, and/or setting aside the Order of Adoption, although your petitioner strongly feels that sufficient

grounds have been set forth herein for such relief.

VIII. CONCLUSION

35. That the names, addresses and relationships of all persons interested in this proceeding are as follows:

Name- Lorraine Robertson
Address- Dock Street
Milton, New York
Relationship- Natural Mother

Name- Richard N. Robertson
Address- Dock Street
Milton, New York
Relationship- Adoptive Father

Name- Jonathan Lehr
Address- 20 North Broadway
White Plains, N. Y.
Relationship- Natural Father

36. That no previous application has been made for the relief herein prayed for.

37. That in view of the past conduct of the natural mother, Lorraine, and further, in view of the unconstitutionality of Sections 111 and 111a of the Domestic Relations Law of the State of New

York, the Order of Adoption herein granted by this Court on March 7, 1979, should be opened, vacated and set aside, and further, that your petitioner and his attorney be permitted to inspect the sealed records of this adoption proceeding.

WHEREFORE, your petitioner respectfully prays for an order:

(a) Vacating, opening and/or setting aside the Order of Adoption hereinbefore made in these proceedings; and

(b) Unsealing all records in connection with these adoption proceedings so as to permit the petitioner and his attorney to examine and inspect all such sealed records, order and any index thereof; to gether with such other and further relief as may be just and proper in the circumstances.

Dated: White Plains, New York
June 13, 1979.

Jonathan Lehr

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

JONATHAN LEHR, being duly sworn, deposes and says:

That I am the petitioner in the action herein.

That I have read the annexed petition, know the contents thereof, and that the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters, I believe them to be true.

_____
Jonathan Lehr

Sworn to before me on
this 13 day of June, 1979.

_____
David Jay Freeman
Notary Public, State of New York
(Jurat omitted in printing)

STATE OF NEW YORK
FAMILY COURT : COUNTY OF ULSTER
----------X

In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.

of an adoptive child having the first name of JESSICA, whose full name is contained in the schedule annexed to the petition herein.
----------X

Docket No. A 47-48

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS.:

Helen E. Lehr, being duly sworn, deposes and says:

I am the mother of Jonathan Lehr who petitioned this Court to vacate and open the adoption proceedings above referred to, in which proceedings the infant, Jessica Martz, was adopted by Richard N. Robertson, the adoptive father and Lorraine Robertson (Martz), the adoptive mother. I respectfully ad-

vise the Court that all of the facts and circumstances which are set forth in this affidavit are of my own personal knowledge.

I have read and reviewed the affidavit of Lorraine Robertson (whom I shall hereinafter refer to as Lorraine) which has been previously submitted in other proceedings and which is annexed to these papers as exhibit G, and because of the many inaccuracies and omissions contained in that affidavit, I felt compelled to advise the Court of the true facts as I know them. Hopefully, the Court will use these facts to protect the rights of and to determine the best interests of all parties involved and especially those of the infant, Jessica Martz.

I first met Lorraine when she was 16 years of age at which time she was experiencing many problems, not the least

of which was being without a home as she was not living with her parents at this time. As I grew to know Lorraine better, I offered her a place to stay in the hope she would be able to straighten out her life, and she accepted. During the time Lorraine lived with me, I became very fond of her and for a short period of time even made her my ward in order that she would be permitted to attend the local high school. Regrettably, she acquired certain habits which were unacceptable to me including her relationship with her boyfriend. In view of this problem, and other various situations which arose, Lorraine and I mutually decided that it would not be to our mutual best interests to continue our relationship. Therefore, we dissolved our legal relationship as I could not take the burden of her continued absences and relations as noted above.

After our legal relationship was dissolved, Lorraine, at the age of 17 or 18, became pregnant and she and her boyfriend left New York and went to North Carolina where Lorraine was promptly abandoned by her boyfriend. She thereafter returned to New York with her child Renee and came back to live with me on two occasions for extended periods of time. Lorraine was quite mixed up at this point and needed very badly to have a mother figure. Once again, though, Lorraine being unsure of where she was and where she wanted to go, left without giving me notice and further, without telling me where she was going.

During the time Lorraine lived with me with her first child Renee, my son Jonathan, who had not been living at home, met Lorraine, and the two of them seemed to have a good relationship. As was customary with Lorraine, after she

left, she reappeared, and subsequently moved in with my son, Jonathan Lehr. During that period of time, I came to observe a rather tender and loving relationship between Jonathan and Lorraine as well as between Jonathan and Renee, Lorraine's daughter. Jonathan was very good for Renee psychologically, and the child showed a great love and affection for Jonathan.

Jonathan and Lorraine then split for a short period of time and then lived together again, from the latter part of 1974 until 1976, during which time Lorraine became pregnant. Both during her pregnancy and afterwards, Lorraine always acknowledged to me that she was absolutely certain that Jonathan was the father, and there was never any question in anyone's mind as to who fathered the child who subsequently was named Jessica and who is the subject of these

adoption proceedings. During Lorraine's pregnancy, Jonathan and Lorraine announced their engagement, and I even gave them a set of flatware as an engagement present. At that time, both Lorraine and Jonathan spoke of marriage; however, due mainly to finances, and Jonathan's attendance at school, they were unable to get married.

At the time Jessica was born, on November 9, 1976, Jonathan was present every day at the hospital during those periods of time when only fathers were allowed to visit, and I was indeed quite shocked when I found out that Lorraine had not named Jonathan as the father on the child's birth certificate, as she had always acknowledged Jonathan as the father. After the birth of Jessica, Lorraine dropped out of sight and it was not until approximately 5 months after the birth of the child that Lorraine came to

visit me with the child. Thereafter, though, I did not see Lorraine nor the child again. However, I did receive intermittent phone calls from Lorraine, wherein she advised me of the baby's health, and what she had been doing. She would never, however, give me her address or phone number, or tell me what name she was using.

During the latter part of the spring and early summer of 1978, Lorraine called, once again not divulging her whereabouts, phone number, or name. However, she did tell me that she had married. In discussing the child, Jessica, she indicated that both she and her husband were desirous of adopting Jessica but that they had been advised by their attorney that if they did so, they would have to notify Jonathan and that they were not inclined to go through with the adoption for that reason. Lorraine also

told me in these conversations that she had been advised by lawyers not to keep calling me as this would not be in her best interests when and if she decided to adopt the child. During all the conversations which I had with Lorraine during the summer of 1978 through the end of November, 1978, she at times would put Jessica on and would always refer to me as Jessica's grandmother. The last time I spoke to Lorraine was right before December, 1978, and I have not heard from her since.

It is respectfully submitted that the foregoing affidavit is based on my own personal knowledge of both my relationship with Lorraine and Lorraine's relationship with Jonathan. I hope the Court will use this information to determine what the best interests of the child, Jessica are, and also protect the rights of both Jonathan and Lorraine in

connection with these adoption proceedings.

Helen E. Lehr

Sworn to before me this

11th day of June, 1979

Herman J. Wohlitka
Notary Public, State of New York
No. 41-4646933
Qualified in Queens County
Commission Expires March 30, 19__

SCHEDULE A

The full name of the adoptive child is
JESSICA MARTZ

EXHIBIT A - ORDER OF ADOPTION
STATE OF NEW YORK
FAMILY COURT: COUNTY OF ULSTER
----------X

In the Matter of the Adoption
by LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.

of JESSICA MARTZ,
Adoptive Child
----------X

Docket No.A 47 78
ORDER OF ADOPTION
(Private Placement)

The petition of LORRAINE ORBERTSON and RICHARD N. ROBERTSON, JR. verified the 21st day of December, 1978, having been duly presented to the Court, together with an agreement on the part of the petitioning adoptive parents to adopt and treat the above-named adoptive child as their own lawful child, and together with the affidavits of LORRAINE ROBERTSON and RICHARD N. ROBERTSON, JR., adoptive parents, verified December , 1978, affidavit of LORRAINE ROBERTSON, natural mother, verified December , 1978 and the affidavit of JAY L. SAMOFF, attorney, ve-

rified December , 1978, and the consent required by Section 111 of the Domestic Relations Law

AND the aforesaid petitioning adoptive parents and the above named adoptive child and all other persons whose consents are required as aforesaid having personally appeared before this Court for examination,

AND an investigation having been duly ordered and made and the written report of such investigation having been duly filed with this Court, as required by the Domestic Relations Law,

AND this Court being satisfied that the moral and temporal interests of the adoptive child will be promoted by the adoption and that there is no reasonable objection to the proposed change of the name of the adoptive child,

NOW, ON MOTION OF STREIFER, BARNO-

- VITZ & SAMOFF, P.C.

attorneys for the petitioners herein, and upon all the papers and proceedings herein, it is

ORDERED that the petition of LORRAINE ROBERTSON and RICHARD N. ROBERTSON, JR. for the adoption of JESSICA MARTZ, a person born on or about November 9, 1976, at White Plains, New York, be and the same hereby is allowed and approved; and it is further

ORDERED that the said adoptive child shall henceforth be regarded and treated in all respects as the lawful child of the adoptive parents; and it is further

ORDERED that the name of the said adoptive child be and the same hereby is changed to

JESSICA ROBERTSON

and that the said adoptive child hereafter be known by that name; and it is further

ORDERED that the appropriate Clerk be

and he is hereby authorized to prepare, certify and deliver to the petitioners herein or to their attorneys copy of this Order, and it is further

ORDERED that this Order, together with all other papers pertaining to the adoption, shall be filed and kept as provided in the Domestic Relations Law and shall not be subject to access or inspection except as provided in said law.

Signed this 7th day of March, 1979, at ULSTER COUNTY FAMILY COURT, Kingston, New York.

_____
Signature

HUGH R. ELWYN

Judge of the Family Court
County of Ulster

If consent of any person was not required by reason of any of the exceptions provided in Section 111 of the Domestic Relation Law recite facts relative thereto and as to due service thereof.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

CLERK'S CERTIFICATION

I, SUSAN L. LAMBERTSON, DEPUTY CHIEF CLERK of the Family Court of the State of New York, Ulster County, do hereby certify that I have compared the foregoing copy of a ORDER OF ADOPTION with the original thereof filed in this office and that the same is a true copy thereof, and of the whole of such original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 7th day of March, 1979.

s/
Deputy Chief Clerk of
the Court

EXHIBIT B TO ORDER TO SHOW CAUSE

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

In the Matter of the Paternity Petition of

JONATHAN LEHR,
Petitioner

-against-

LORRAINE ROBERTSON
Respondent

----------X

Docket No. P-71-79

SUMMONS

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO:

LORRAINE ROBERTSON
DOCK STREET
MILTON, NEW YORK

A paternity petition under Article 5 of the Family Court Act having been filed in this Court; a copy of said petition being annexed hereto;

YOU ARE HEREBY SUMMONED TO appear before this Court at

COUNTY COURTHOUSE, 111 GROVE STREET,

WHITE PLAINS, NEW YORK, New York, on

MARCH 12, 1979, at 9:00 AM o'clock in the forenoon of said day to show cause why

the Court should not enter a declaration of paternity, an order of support and such other and further relief as may be appropriate under the circumstances.

ON YOUR FAILURE TO APPEAR as herein directed a warrant may be issued for your arrest.

BY ORDER OF THE COURT

Sylvia Lee Kingston
Deputy Clerk of the Court

Dated: FEBRUARY 21, 1979

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

In the Matter of a Paternity Petition of

JONATHAN LEHR
Petitioner

against

LORRAINE ROBERTSON
Respondent

----------X

Docket No. P-71-79

VISITATION AND
PATERNITY PETITION
(MOTHER) (FATHER)

TO THE FAMILY COURT:

The undersigned Petitioner respectfully shows that:

1. Petitioner resides at 20 North Broadway, White Plains, New York.

2. Petitioner had sexual intercourse with the above named Respondent on several occasions covering a period of time beginning on or about the 1st day of October, 197 and ending on or about the 1st day of October, 1976, and as a result thereof, Respondent became pregnant with child, and

3.(a) Respondent gave birth to a (female) child out of wedlock on the 9th day of November, 1976, and said child now lives with Respondent at Dock Street, New

York.

4. Respondent, who resides at Dock Street, Milton, New York, is the mother of said child.

5. Petitioner has (not) acknowledged paternity of said child (in writing) (&)(or)(by furnishing support).

6. See below.

WHEREFORE, Petitioner prays that this Court issue a summons or warrant requiring that Respondent show cause why the Court should not enter a declaration of paternity, an order of support and such other and further relief as may be appropriate under the circumstances, including a provision awarding to Petitioner reasonable visitation rights.

Dated: 1/30/79

Jonathan M. Lehr
Petitioner

6. That Petitioner has been denied visitation of the said infant child, and the Petitioner respectfully requests that the Court, in addition with the other relief herein prayed for, award to the Petitioner reasonable visitation privileges with said infant issue.

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) SS.:

Jonathan Lehr, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

Jonathan M. Lehr
Petitioner

Sworn to before me this 30th
day of Jan.

Michael A. Kramer
Court Clerk I of the Family Court
Notary Public

Michael A. Kramer, Esq.
Notary Public, State of New York

(Jurat omitted in printing)

EXHIBIT C TO ORDER TO SHOW CAUSE-LETTERS: PETITIONER'S ATTORNEY TO RESPONDENTS

December 12, 1978

Ms. Lorraine Richardson
Dock Street
Milton, New York

Re: Jonathan Lehr

Dear Ms. Richardson:

Please be advised that we represent Jonathan Lehr. He has requested that we communicate with you with respect to arranging for visitation with your daughter Jessica. Mr. Lehr advised us that he has been unable to communicate with you or that his requests have been ignored.

Needless to say we would like to resolve this matter on an amicable basis without either party resorting to the remedies and procedures which are available in the courts. We would therefore appreciate it if either you or your attorney would communicate with us as promptly as possible so that we may discuss this matter.

Your immediate attention would be appreciated.

Very truly yours,

DAVID J. FREEMAN

DJF:aj
cc: Jonathan Lehr

January 8, 1979

Ms. Lorraine Robertson
Dock Street
Milton, New York

Re: Jonathan Lehr

Dear Ms. Robertson:

To date we have not received a response to our prior letter of December 12, 1978 in connection with our client's request for appropriate visitations with Jessica. While our prior letter to you incorrectly listed your name as "Richardson", we assume you received the letter inasmuch as we did not have it returned by the post office.

We would once again urge you to respond to our letters so that an amicable solution can be worked out. However, we have been instructed to advise you that unless we receive a response from you within seven days from the date of this letter, appropriate proceedings will be commenced in the Family Court, Westchester County, so that our client may obtain the rights to which he is entitled.

We once again hope this matter can be resolved in a mutually satisfactory manner without litigation; however, we cannot incur any further delay.

Very truly yours,

DAVID J. FREEMAN

DJF:aj
cc: Jonathan Lehr

returned: unclaimed

Law Offices of

DAVID J. FREEMAN
175 Main Street
White Plains, New York 10601

Return to sender.

78

Ms. Lorraine Robertson
Dock Street
Milton, New York

EXHIBIT D TO ORDER TO SHOW CAUSE - PETITION FOR ADOPTION

STATE OF NEW YORK
FAMILY COURT
COUNTY OF ULSTER Docket No.

----------x

In the Matter of the Adoption by LORRAINE ROBERTSON and RICHARD N. ROBERTSON, JR. of JESSICA MARTZ
Adoptive Child

PETITION FOR ADOPTION (Private Placement)

----------x

The Petitioners show to this Court:

Omit (a) if no adoptive mother

1. (a) The name and place of residence of the adoptive mother are: Name: LORRAINE ROBERTSON Address: (include county) P.O. Box 65 (Dock Road) Milton, NY 12547 (Ulster Co.) She is (of full age) (~~a minor~~), born on June 8, 1955. She is (~~unmarried~~) (married to RICHARD N. ROBERTSON, JR. and they are living together as husband and wife). Her religious faith is Christian. Her occupation is Housewife and her approximate annual income is $None.

Omit (b) if no adoptive father

(b) The name and place of residence of the petitioning adoptive father are: Name:

RICHARD NICKOLAI ROBERTSON, JR. Address: (include county) P.O. Box 65 (Dock Road) Milton, NY 12547 (Ulster Co.) He is (of full age) (~~a minor~~), born on March 13, 1954. He is (~~unmarried~~) (married to LORRAINE ROBERTSON and they are living together as husband and wife). His religious faith is Christian. His occupation is Truck Driver (owner/operator) and his approximate annual income is $50,000.

If adoptive child is over 18 years of age and joins in the petition so state and set forth residence of adoptive child (including country)

(~~X~~)

2. As nearly as the same can be ascertained the name, date and place of birth of the above-named (~~male~~)(female) adoptive child are: Name: JESSICA MARTZ Date of birth: November 9, 1976 Place of birth: White Plains, New York.

3. (a) As nearly as the same can be ascertained, the religious

faith of the adoptive child is Christian.

(b) As nearly as the same can be ascertained, the religious faith of the natural parents of the adoptive child is Christian.

State all relevant facts including name and address (including county) of the parents or persons having lawful custody from whom the adoptive child was obtained. If adoptive child is related to any petitioning adoptive parent specify the relationship.

4. The manner in which the adoptive parents obtained the adoptive child is as follows: Adoptive mother is natural mother and who has had child since birth. Adoptive father married natural mother on 8/28/77 and has resided with child at all times since.

Omit if no name change

5. The adoptive child has resided continuously with the adoptive parents since with mother since birth, with father since 8/28/77.

D.R.L.§§111, 112,115

6. The new name by which the child is to be known is Jessica Robertson.

7. (On information and belief:) (a) The consent of the natural mother of the adoptive

child (~~is submitted herewith~~) (is unnecessary by reason of the fact that) she is the adoptive mother

Strike out if inapplicable

(b) The consent of the natural father of the adoptive child (~~is submitted herewith~~) (is unnecessary by reason of the fact that) the child was born out of wedlock and consent is thereby unnecessary.

If guardian has been appointed for adoptive child state name and address of guardian, name and location of appointing court and date of order.

(c) The consent of the above-named persons having lawful custody of the adoptive child has been duly executed and filed herewith.

8. The adoptive child has no Guardian **except**

9. The adoptive child has not been previously adopted **except**

10. To the best of petitioners information and belief, there are no persons other than those hereinbefore mentioned in this proceeding, **except**

Insert any additional allegations, e.g. grounds, if any, for dispensing with period of residence and/or

11. The petitioning adoptive mother is the natural mother of the child and the child has resided with the natural mother and petitioning adoptive fa-

period after filing petition. D.R.L. §116

ther for more than six months, and, accordingly, pursuant to Domestic Relations Law §116 the six months waiting period is not required.

Insert nature, venue and disposition of any prior application.

12. No previous application has been made to any court or judge for the relief sought herein ~~except~~

WHEREFORE, your petitioners pray for an order approving the adoption of the above-named adoptive child by the above-named adoptive parents and directing that the said adoptive child shall be regarded and treated in all respects as the child of the said adoptive parents and directing that the name of the said adoptive child be changed to and that (s)he shall henceforth be known by the name of JESSICA ROBERTSON, and it is further requested that the 6 month waiting period after filing of petition be dispensed with;

Insert request of any other relief, e.g. dispensing with period of residence and/or period after filing of petition.

together with such other and further relief as may be just and proper.

/s/
(Adoptive Mother)

/s/
(Adoptive Father)

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ULSTER) ss.:

being duly sworn, depose and say: That we are the petitioners herein; that we have read the foregoing PETITION and know the contents thereof; that the same is true to our own knowledge except as to matters therein stated to be alleged on information and belief and that as to those matters believe it to be true.

/s/
(Adoptive Mother)

/s/
(Adoptive Father)

Sworn to before me this
21st day of Dec. 1978
/s/
Notary Public State of New York
Jay Samoff
Notary Public, State of New York
No.
Qualified in Nassau County
Cert. Filed in Ulster County
Commission Expires March 30, 1980

Resworn to before me this
15th day of January, 1979
/s/ Hugh R. Elwyn
Judge of the Court

(If not verified before the Court, see D.R.L. 112(5) for Acknowledgment)

Name, post office address and telephone number of Attorney for Petitioners:

STREIFER, BARNOVITZ & SAMOFF, P.C.
9 Main Street,
Kingston, NY 12401
(914) 331-4977

Supporting Documents:
Consent
Agreement of Adoption
Marriage Record of Petitioner(s) (Certified copy)
Birth Certificate of Adoptive child (Certified copy) - (If born in New York City, 2 Certificate required)

Affidavits:
1. affidavit of adoptive parents
2. affidavit of natural mother
3. affidavit of attorney

Other Documents (List)

EXHIBIT E TO ORDER TO SHOW CAUSE - ORDER TO SHOW CAUSE AND AFFIRMATION

STATE OF NEW YORK
FAMILY COURT : WESTCHESTER COUNTY

In the Matter of the Paternity Proceeding of

JONATHAN LEHR,

Petitioner,

-against-

LORRAINE ROBERTSON,

Respondent.

ORDER TO SHOW CAUSE

Upon the annexed affirmation of Jay L. samoff, Esq., dated February 26, 1979, and sufficient reason appearing therefor,

LET the petitioner, Jonathan Lehr. show cause before the Westchester County Family Court, at a term thereof to be held at the Westchester County Family Court, 111 Grove Street, White Plains, New York, on the 12th day of March, 1979

at 9:00 o'clock in the forenoon of that day why an order should not be made changing the venue of this proceeding to the Ulster County Family Court on the grounds that such change would be more convenient to material witnesses and the ends of justice would be served thereby; and it is further

ORDERED, that until the determination of this application for a change of venue any and all other and further proceedings in this matter be and hereby are stayed; and it is further

ORDERED, that service of a copy of this order and the affirmation upon which it is based upon the petitioner, Jonathan Lehr, by certified mail, return receipt requested, addressed to him at 20 North Broadway, White Plains, New York, the address provided by such petitioner in his petition, on or before March 15, 1979

shall be deemed sufficient.

Dated: February 26, 1979

Hugh R. Elwyn
JUDGE, FAMILY COURT
ULSTER COUNTY

STATE OF NEW YORK
FAMILY COURT : WESTCHESTER COUNTY

In the Matter of the Paternity
Petition of

JONATHAN LEHR,

Petitioner,

-against-

LORRAINE ROBERTSON,

Respondent.

AFFIRMATION

JAY L. SAMOFF makes the following affirmation under penalty of perjury:

I am the attorney for the respondent, Lorraine Robertson, and I am familiar with the facts set forth herein. I make this affirmation in support of an application pursuant to Family Court Act Sections 171 and 174 and CPLR 510 and 511 changing the venue of this proceeding to Ulster County Family Court.

This is a proceeding commenced by

a putative father of an illegitimate child for an order of filiation and for visitation rights. The summons and petition were mailed to the respondent mother by the Family Court of Westchester County and received by her on Thursday, February 22nd, 1979. For the convenience of witnesses and in the interest of justice the proceeding should be transferred to Ulster County Family Court.

The petitioner is apparently a Westchester County resident. All other significant contacts in this case, however, are with Ulster County.

The respondent, Lorraine Robertson, resides in Ulster County.

The child, Jessica Martz, resides in Ulster County with her mother.

The best interest of the child necessarily concerns itself with the child's home life, physical well-being and neighborhood environment. Testimony

in this regard thus will come from family, friends, neighbors and physicians all of whom reside in Ulster County.

Further, there is presently pending in the Ulster County Family Court an adoption proceeding concerning the same child who is the subject of this paternity proceeding. The adoptive parents in such proceeding are the natural mother and her husband, Richard N. Robertson, Jr. Mr. Robertson resides with the mother and child in Ulster County. Obviously, Mr. Robertson has a very great interest in these proceedings and should be a party thereto.

It is pointed out that the Ulster County adoption proceeding was commenced more than two months ago, in December, 1978. The hearings therein have been completed and all that is left to be done therein is the final submission of the Ulster County Department of Social Ser-

vices adoption investigation report and the formal signing of the order of adoption.

Since the Ulster County Family Court will necessarily be reviewing and passing upon the best interests of the child in connection with the adoption proceeding, it would be unjust, inefficient, superfluous, and an otherwise waste of time and money for another court to pass upon the same matter at the same time.

Accordingly, the interest of justice, as well as the convenience of witnesses, will best be served by a removal of this proceeding to Ulster County.

The Westchester County paternity proceeding is returnable on March 12, 1979. It would be inappropriate to proceed with that matter until such time as the court determines this application for change of venue. Thus, an order is fur-

ther requested staying the Westchester County matter pending the determination of this application.

No previous application for the same or similar relief has been made.

Dated: February 26, 1979

S/_____
JAY L. SAMOFF

EXHIBIT F TO ORDER TO SHOW CAUSE -
BIRTH CERTIFICATE

New York State Department of Health

Albany, N.Y. 12237

CERTIFICATE OF BIRTH REGISTRATION

This certifies that a certificate of birth has been filed under the name of:

JESSICA MARTZ

Sex: Female

Born on: November 9, 1976

At: White Plains, New York

Name of father:
- - - - - - - -

Maiden name of mother:
Lorraine Martz

Local Registration No.: 1157

Date filed: November 29, 1976

Date issued: November 29, 1976

S/_____
Registrar of Vital Statistics
Address: White Plains, New York

EXHIBIT G TO ORDER TO SHOW CAUSE - REPLY AFFIDAVIT OF LORRAINE ROBERTSON

STATE OF NEW YORK
FAMILY COURT : WESTCHESTER COUNTY
----------X
In the Matter of the Paternity Proceeding of

JONATHAN LEHR,

Petitioner,

-against-

LORRAINE ROBERTSON,

Respondent.

----------X

REPLY AFFIDAVIT

STATE OF NEW YORK:
: ss.:
ULSTER COUNTY :

LORRAINE ROBERTSON, being duly sworn, deposes and says:

I am the respondent in this matter and I have personal knowledge of the facts set forth herein.

I have read the affirmation of my attorney, Jay L. Samoff, Esq., dated April 5, 1979 and April 25, 1979, and I

hereby confirm and ratify each and every statement of fact contained therein.

My child, Jessica, was born out of wedlock on November 9, 1976. On August 28, 1977 I married Richard N. Robertson, Jr. and we remain husband and wife. Annexed to the moving papers is a copy of the petition for the adoption of Jessica, the original of which is on file with the Ulster County Family Court. The statements made by me and by Richard N. Robertson, Jr. are true and correct. The order of adoption annexed to such moving papers is also a true and correct copy of the original.

The background of this matter as provided by the petitioner in his opposing affidavit contains numerous incorrect statements and half-truths. I will not attempt to respond to each and every such statement, since any such discussion is entirely irrelevant and immaterial to

this motion. Mr. Lehr's assertions are merely a blatant attempt to enlist the sympathy of the court and are not worthy of response. Suffice it to say that until just a few months ago Mr. Lehr has never shown any interest in my daughter, Jessica. Since Jessica's birth petitioner has visited twice, and neither time did he pay any attention or show any interest in Jessica. While he did visit with my other daughter, Renee, on about four occasions, Jessica and I were not present at those times. It is true that I threatened to call the police if Mr. Lehr were to continue bothering me, but this statement was made only after Mr. Lehr threatened to kidnap my daughter, Renee, and to take her from me.

All of the foregoing, however, is besides the point. The issues raised by this motion do not concern themselves with these factual matters.

In truth and in fact, there is, as my attorney has said, "no love lost" between me and the petitioner. It is my great desire that he desist in following me around and attempting to intrude upon the home my husband and I have made for ourselves.

I hereby confirm my lawyer's statement that Jessica has been brought up with me in my household, and that such household is the only one she has ever known. The petitioner has never been part of that household, and my husband, Richard N. Robertson, Jr., is the only person my daughter recognizes as her father. The mutual love, affection and acceptance between them is obvious to a who know them.

Finally, I wish to point out that the petitioner paints a picture that implies that I have been wrongful in moving away from White Plains, and that it is

wrongful for me to want to be married and to live in peace with the man I love and to be free from intrusions upon my life and family. Mr. Lehr has no claims upon me, and if it is wrong for me to want to raise my children with my husband, and to be free from the harrassment of the petitioner, then I am guilty.

Finally, I again reiterate my lawyer's arguments that this proceeding constitutes a great intrusion upon the rights of my husband. This court does not have jurisdiction over my husband and any determination adverse to his interests as the adjudicated father of Jessica would constitute a denial of his right to due process under law. Thus far even the petitioner has not denied this.

For the foregoing reasons, and for the reasons set forth in my attorney's

affirmations, the petition should be dismissed.

Lorraine Robertson

Sworn to before me
this 25th day of April, 1979.

Notary Public

Jay Samoff
Notary Public, State of New York

(Jurat omitted in printing)

EXHIBIT H TO ORDER TO SHOW CAUSE - LETTER OF PETITIONER'S ATTORNEY TO FAMILY COURT JUDGE

March 8, 1979

Hon. Hugh Ross Elwyn
Family Court, Ulster County
County Office Building
Fair Street
Kingston, N.Y. 12401

Re: Jonathan Lehr with Lorraine Robertson

Dear Judge Elwyn:

This letter will serve to confirm our telephone conversation of March 7, 1979. As we indicated to you in that conversation, we represent Jonathan Lehr, a resident of Westchester County, who had heretofore, in January, 1979, instituted a paternity proceeding in the Family Court of Westchester County. The nature of that paternity proceeding was to have Mr. Lehr declared the natural father of the infant, Jessica Martz, who was born out of wedlock on November 9, 1976. The mother of said child is Lorraine Robertson, the respondent in said paternity proceeding.

As we further indicated to you in said conversation, our client, Mr. Lehr, on March 3, 1979 was served with an order to show cause signed by your Honor, the nature of which order was to stay the paternity proceedings in Westchester County pending the determination of the motion made by the attorney for Lorraine Robertson, and to have the Westchester

County paternity proceedings transferred to the Ulster Family Court. The reason set forth in those papers, which were signed by your Honor, was that there was presently pending before your Honor adoption proceedings involving the said infant, Jessica Martz, and the husband of Lorraine Robertson.

We further indicated to your Honor in said conversation that the purpose of our call was to advise the Court personally that an order to show cause was being submitted to the Family Court in Westchester County in order to stay the adoption proceedings for the following reasons:

> 1. That the putative father, Jonathan Lehr, had not been given notice of the adoption proceedings and had not had the opportunity to be heard in those proceedings; and
>
> 2. That said adoption proceedings should be stayed pending the final determination of the paternity proceedings in Westchester County.

In response to our comments, your Honor acknowledged that you had been aware that paternity proceedings had been instituted by the putative father, but that it was too late for us to obtain a stay in view of the fact that on that very morning of March 7, 1979, at the "urgent" request of the adoptive parents, your Honor had signed all the adoption papers, and the adoption proceedings were now completely terminated with the adoption having been approved. We ex-

pressed great shock to your Honor that the Court had permitted the adoption proceedings to be concluded in view of its awareness of the paternity proceedings pending in Westchester County. Your Honor, however, indicated that pursuant to Section 111 of the Social Service Law, the putative father was not entitled to any notice and that therefore the adoption proceedings could be completed without notification to, or testimony by, the said putative father, Jonathan Lehr.

It is respectfully submitted that the failure of the Court to permit Mr. Lehr to be heard during these adoption proceedings may not have been in the best interests of the child and, in any event, certainly was a violation of Mr. Lehr's due process rights. This is especially the case in light of the Court's prior knowledge of Mr. Lehr's paternity petition. Certainly it is possible that Mr. Lehr's testimony may have made available to the Court additional information which would have helped it in determining what were the best interests of the child. Your Honor, however, indicated he would not reopen the adoption proceedings, and that we would have to proceed in another fashion if we would wish to do so.

We intend to immediately meet with our client, Mr. Lehr, and discuss the ramifications of the adoption proceedings and his legal rights with respect thereto. We shall advise the Court by way of legal process or otherwise as to his decision.

Very truly yours,

DJF:aj

DAVID J. FREEMAN

ANSWERING AFFIRMATION OF JAY SAMOFF, ESQ.
DATED JULY 6, 1979

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY
----------X
In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

of

JESSICA MARTZ,

Adoptive Child.

----------X

AFFIRMATION

JAY L. SAMOFF makes the following affirmation under penalty of perjury:

I am the attorney for Lorraine Robertson and her husband, Richard N. Robertson, Jr., and am familiar with the facts set forth herein. I make this affirmation in opposition to the application of Jonathan Lehr to set aside the order of adoption herein.

There is no merit to the application.

COUNTER-STATEMENT OF CHRONOLOGY

In December, 1978 Lorraine Robertson and her husband, Richard N. Robertson Jr., filed with the Ulster County Family Court a petition for the adoption by Mr. Robertson of Jessica Martz, Lorraine Robertson's natural child, who was born out of wedlock on November 9, 1976.

The adoption hearing was routinely scheduled for January 15, 1979 and was conducted that day. At the hearing the only two witnesses were Mr. and Mrs. Robertson. The inquiry was conducted entirely by the court, and Mr. and Mrs. Robertson merely confirmed the contents of their petition. In addition thereto, Mrs. Robertson submitted an affidavit in which she confirmed that there was no person who was entitled to notice of the proceedings pursuant to Domestic Relations Law § 111-a.

Jonathan Lehr alleges that he

filed a petition in a filiation proceeding in Westchester County Family Court on January 31, 1979 concerning the same infant that was the subject of the Ulster County adoption proceeding. The summons in the Westchester County proceeding, however, did not issue until February 21, 1979 and was served by mail on or about February 22 or 23, 1979. Prior to that date neither Mr. and Mrs. Robertson nor their attorney had any knowledge of the commencement of the filiation proceeding. A copy of the summons and the transmittal envelope is annexed as Exhibit B.

On Friday, February 23, 1979, as attorney for the Robertsons, I received and reviewed the filiation proceeding summons and petition, and I then attempted to inform the Ulster County Family Court. Judge Elwyn was not available on that day, however.

On Monday, February 26, 1979 I im-

mediately notified Judge Elwyn of the existence of the Westchester County proceeding, and requested that he issue an order to show cause in connection with a motion to change the venue of that matter to Ulster County. The purpose of the motion for a change of venue was not to combine the two proceedings, but to make it easier and more convenient for local witnesses. It was never intended that the two matters be heard together, for the adoption hearing had already been completed. Certainly Mr. Lehr did not expect or desire the two proceedings to be combined, because he vigorously opposed the motion for a change of venue.

The motion for a change of venue was denied, further keeping the two proceedings separate.

On March 7, 1979 the Ulster County Family Court signed the order of adoption herein.

Thereafter, Lorraine Robertson, the respondent in the filiation proceeding, moved in Westchester County Family Court to dismiss the petition on several grounds. On June 20, 1979 Hon. Vincent Gurahian, Westchester County Family Court Judge, signed an order dismissing Mr. Lehr's petition.

On June 27, 1979 Mr. and Mrs. Robertson and I each received the motion papers on this application.

The purpose of the foregoing counter-statement was to set forth the chronology of events as they occurred, and without the innuendo of fraud and secrecy implied in Mr. Lehr's petition. The court is well aware that I personally notified it of the existence of the filiation proceeding as soon as reasonably possible after learning of it. The court was notified thereof on February 26, 1979 and the order of adoption was

signed on March 7, 1979.

PETITIONER'S APPLICATION IS UNTIMELY

As conceded by Mr. Lehr in his petition of June 13, 1979 he learned of the Ulster County adoption proceedings as early as Saturday, March 3, 1979 (see petition, p. 5). It was not until the following Wednesday, March 7, 1979, however, that his attorney telephoned Judge Elwyn to ask for a stay. He was too late, as the order of adoption already had been signed.

Thereafter petitioner took no steps whatever to set aside the order for adoption for a period of close to four months when on June 22, 1979 the order to show cause on this motion was signed. No excuse for waiting for such a period has been offerred.

Petitioner's delay is particularly glaring since by telephone in April, 1979

and in writing several times thereafter I informed petitioner's attorney that only the Ulster County Family Court could determine if Mr. Lehr was entitled to any relief. I specifically asked Mr. Freeman as early as April 24, 1979 why he did not just immediately make the motion to set aside the order of adoption so that we could then and there address the issues and get a prompt determination. He refused.

The infant Jessica, who was but 25 months old when the adoption proceedings were started, is now 32 months old; her name and birth records have been changed; and she and her parents and two sisters have grown ever more close as a family unit.

Petitioner's delay in making this motion is highly inexcusable and prejudicial and constitutes laches, and should not be countenanced.

THERE IS NO MERIT TO THE PETITION

Petitioner, Jonathan Lehr, goes to great lengths to provide his version of the history of the relationship between himself and Lorraine Robertson. Such history, however, is entirely besides the point and only serves to confuse and obfuscate the one and only issue truly before the court: Was it required that Jonathan Lehr be put on notice of the adoption proceeding? The court should not be dissuaded by this smokescreen of confusion from reaching this singular issue.

Essentially, petitioner raised but two points: (1) the order of adoptopn should be set aside because it was procured through the fraud of Lorraine Robertson, and (2) the court did not have jurisdiction to grant the order of adoption due to the unconstitutionality of Domestic Relations Law Sections 111

and 111-a. Neither point has merit.

It is noted that Mr. Lehr's assertion that the court is guilty of an abuse of discretion is not grounds to set aside an order, and the court may not properly consider such argument. CPLR 5015.

NO FRAUD HAS BEEN COMMITTED

The court is fully aware that no fraud has been committed. This is evident as shown by the following facts.

In December, 1978 Lorraine Robertson and her husband, Richard N. Robertson, Jr., contacted me for the purpose of having Mr. Robertson adopt Mrs. Robertson's two children, Renee Martz and Jessica Martz. (Mr. and Mrs. Robertson also have a third child.)

Since both children were born out of wedlock it was necessary to research precisely what persons were entitled to notice of and to participate in the adoption proceedings. After reviewing Domes-

tic Relations Law § 111-a it became apparent to me that putative fathers of children born out of wedlock are entitled to participate in adoption cases in only seven circumstances. I made diligent inquiry of Lorraine Robertson and found that there was no person who met the criteria for notice pursuant to DRL § 111-a.

Thereafter, and in an effort to be absolutely certain that all proper procedures were followed and that all persons required to be put on notice were indeed put on notice, I personally contacted Ulster County Family Court Judge, Hon. Hugh R. Elwyn, in order to confirm my understanding. Judge Elwyn stated that the procedure was entirely a creature of statute, and he confirmed that putative fathers were entitled to notice only as prescribed by DRL § 111-a.

Thereafter, in December, 1978 the

adoption petition was duly filed in the Ulster County Family Court. The court then scheduled a hearing for January 15, 1979. Prior to the hearing I requested that the court consult the Putative Father Registry to see if any person had filed an intent to claim paternity pursuant to DRL § 111-a, subd. 2(c) and Social Services Law § 372-c. The court made such inquiry and received a certificate confirming that no such filing had taken place.

There being no person required by statute to be put on notice, the adoption hearing proceeded on January 15, 1979. At the hearing an affidavit verified that day by Lorraine Robertson was submitted to the court fully confirming that there is no person entitled to notice pursuant to DRL § 111-a. A copy of such affidavit is annexed as Exhibit A.

The statements made in such affi-

davit have never been disputed, and the facts stated therein are not and cannot be questioned.

Petitioner, Jonathan Lehr, has not and cannot point to a single error, fraud, misstatement, misrepresentation or untruth on the part of any person connected with the adoption proceedings.

Having cited no lawful basis under which he was entitled to notice, the petition instead attempts to create an atmosphere of fraud by asserting that Lorraine Robertson should have disclosed to the court that there was a person "out there somewhere" who is the natural father of the child and who should have been put on notice of the adoption proceeding. This is not true.

In each and every case the court is well aware that when a child is born, somewhere there is a father. By statute, however, it is not within the proper

scope of inquiry in an adoption proceeding to determine who that father is and to give him an opportunity to be heard and to obstruct the adoption, except in the seven instances outlined in DRL S 111-a.

DRL § 111-a is specific, detailed, clear and unambiguous, and pursuant thereto the court was under no duty to inquire into the paternity of the child, nor was the mother under a duty to disclose the name of the father. The court and mother had only the duty to determine the following:

a) Is there a person who has been adjudicated by a court of this state to be the father of the child?

b) Is there a person adjudicated by a court of another state or territory of the United States to be the father of the child?

c) Is there a person who has timely filed an unrevoked notice of intent to claim paternity of the child pursuant to Social Services Law § 372-c?

d) Is there a person who is recorded on the child's birth certificate as the child's father?

e) Is there a person who is openly living with the child and the child's mother at the time this proceeding is initiated and who is holding himself out to be the child's father?

f) Is there a person who has been identified as the child's father by the mother in written, sworn statement?

g) Is there a person who was married to the child's mother within six months subsequent to the birth of the child?

To each question the answer is an unequivocal "No," and petitioner does not dispute this.

Adoption being a status created entirely by statute, the court is powerless to vary therefrom.

In re Whitcomb
271 App. Div. 11, 61 N.Y.S.2d 1
(4th Dept. 1946)

In re Adoption of Pyung B.
83 Misc. 2d 794, 371 N.Y.S.2d 993
(Family Ct. Onandaga Co. 1975)

The statute is clear and unambigu-

ous. The requirements for notice to a putative father are spelled out in specific and detailed terms. If the legislature had intended additional classes of persons to be given notice, it most certainly would have said so. For example, DRL § 111-a, subdiv. 2(f) provides that notice must be given to "any person who has been identified as the child's father by the mother in written, sworn statement." (Underscoring supplied) Had the legislature intended unsworn oral statements to be sufficient, it certainly would have said so. But the legislature took great care to limit notice to a putative father who was named by the mother only in written, sworn statement.

A further example of the legislature's intentions is evident from the fact that it could have provided an eighth category of putative fathers who are entitled to notice of an adoption

proceeding: "In those cases where the child's natural father is known to the mother, and the court shall make inquiry of the mother with regard thereto." No such provision exists. Further yet, the legislature could have required notice to be published in any and all cases. Again, no such provision exists.

Accordingly, assuming, strictly arguendo, that all of petitioner's statement of "factual background" is true, and assuming further that the court had been fully apprised of this background, petitioner still was not entitled to participate in the adoption proceeding.

Petitioner having shown no fraud nor any lawful basis for his claim that he should have been put on notice of the adoption proceedings, the only issue remaining is the constitutionality of DRL §§ 111 and 111-a.

THE CONSTITUTIONALITY ISSUE WITH RESPECT TO DRL § 111

The order of adoption was signed on March 7, 1979. On April 24, 1979, however, the United States Supreme Court determined that New York's Domestic Relations Law § 111 is unconstitutional as applied to certain circumstances. The order of adoption in this case, though, remains unaffected by the Supreme Court decision in Caban v. Mohammed, __U.S.__.

Firstly, DRL § 111 concerns itself with specifying those persons whose consent to adoption is necessary. It does not consider what categories of putative fathers are entitled to participate. That consideration is outlined in DRL § 111-a, a section not passed upon by the court in Caban v. Mohammed. At no time has any court ruled that DRL § 111-a is not constitutional.

Secondly, in Caban the court de-

termined that DRL §111 is unconstitutional in that it makes an arbitrary distinction when it requires the consent to adoption from the natural mother of an out of wedlock child, but not the natural father. The Supreme Court, however, very carefully pointed out that the statute is not unconstitutional with respect to most cases and may still be applied.

As noted by Mr. Justice Stevens, "as I read the Court's opinion, the statutes now in effect may be enforced as usual unless 'the adoption of older children is sought.' ante, at 11, and 'the father has established a substantial relationship with the child and is willing to admit his paternity.' Id., at 12." Caban v. Mohammed, supra.

In the present case, although we apparently have a putative father who is willing to admit paternity, we have a

mother who has not conceded same. Further, assuming Mr. Lehr is the father, we do not have the adoption of an older child, but a 25 month old infant (now 32 months old). Further yet, here the putative father has never established "a substantial relationship with the child" as required by the court. (See Caban v. Mohammed, supra, decision of Mr. Justice Powell at p. 12 and decision of Mr. Justice Stevens at p. 16).

In fact, here it is admitted that the putative father and the infant have no relationship whatsoever between them.

In any and all events, assuming again all the facts in petitioner's favor, Caban v. Mohammed still is not applicable to this case. That decision was rendered on April 24, 1979, some four months after the commencement of this case, and some six weeks after its conclusion on March 7, 1979. Caban is not

retroactive.

The opinion of the majority in Caban did not discuss the question of the retroactive effect of the decision. It is apparent, however, that retroactive effect cannot and will not be given thereto, for to do so would wreak chaos and havoc in our society. If Caban were to be applied retroactively the parentage and rights of inheritance, descent and succession of every adopted out of wedlock child would be in doubt. As noted by Mr. Justice Stevens (with Chief Justice Burger and Justices Rehnquist and Stewart in agreement, and the majority not expressing any disagreement):

> "The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably fore-

> close retroactive application of this ruling. See Chevron Oil Co. v. Hudson, 404 U.S. 97, 106-107. Families that include adopted children need have no concern about the probable impact of this case on their familial security." [Caban v. Mohammed, supra, opinion of Mr. Justice Stevens at pp. 15, 16]

For a full discussion of this area see Caban v. Mohammed, opinion of Mr. Justice Powell at pages 11 and 12 and the opinion of Mr. Justice Stevens at pages 15 and 16. It is noted that while Mr. Justice Stevens' opinion is labeled a dissent, Section III thereof at pages 15 and 16 are not in dissent, but merely present an opinion of the application of the majority opinion. The majority opinion is not in disagreement therewith.

THE CONSTITUTIONALITY ISSUE WITH RESPECT TO DOMESTIC RELATIONS LAW §111-a

Petitioner concedes that he does not come within the seven categories that would entitle him to notice as a putative

father. Instead he argues that DRL §111-a makes an arbitrary distinction between those seven classes of putative fathers and all others, thus denying him due process of law.

Firstly, it is noted that no court has determined DRL §111-a to be unconstitutional in this regard.

Secondly, it is well-settled that courts of the first instance should not take it upon themselves to find an act of the legislature unconstitutional.

"There is a strong presumption that a statute duly enacted by the Legislature is constitutional." People v. Pagnotta, 25 N.Y. 2d 333, 337.

"[A] finding of unconstitutionality should not be lightly undertaken by courts of the first instance." In re Santosky, decision of Elwyn, J., not officially reported.

"Courts of the first instance

should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the Act is apparent on its face." McKinney's Cons. Laws of N.Y., Book 1, Statutes §150, and authorities there cited.

Thirdly, DRL §111-a does not make arbitrary distinctions and it affords all fathers of out of wedlock children an opportunity to receive notice of an adoption proceeding.

DRL §111-a, subd. 2(a) and (b) rationally and quite naturally provide for notice to be given to anyone who has been lawfully adjudicated the father of the child. No one may seriously quarrel with the proposition that a father whose rights as such have been adjudicated stands in a different position than any other person whose rights have not been

lawfully determined.

Of the remaining five categories the putative father has little or no control over his destiny in four of the situations. The mother could fail to list him on the birth certificate, she could perhaps keep him from living with her, she could fail to give a written, sworn statement admitting he is the father, and she can certainly prevent him from marrying her. In an effort to give all other putative fathers an equal opportunity to be heard, and in an obvious effort to be anything but arbitrary, and to give a putative father an opportunity to control his own destiny, the Legislature created DRL §111-a, subd. 2(c).

DRL §111-a, subd. 2(c) provides that notice of an adoption proceeding must be given to "any person who has timely filed an unrevoked notice of intent to claim paternity of the child,

pursuant to section three hundred seventy two-c of the social services law."

The opportunity to so file with the "Putative Father Registry" is open to everyone and anyone, without any discrimination. The filing of a notice of intent to claim paternity is entirely within the control of all putative fathers and is available to each of them.

Accordingly, there is no classification of natural father who cannot put himself in a position to receive notice under DRL §111-a, and thus there is no denial of equal protection.

Two points should here be made. The petitioner claims that he did not realize that his name was not on the child's birth certificate. Nowhere, however, is it alleged that anybody ever misrepresented to him that he was listed as the father when in fact he was not. Additionally, he concedes he was present

at the hospital where the child's name was listed as "Martz" and not "Lehr," and he further admits that he knew the mother and child were receiving welfare benefits under the name "Martz." In any event, if he was concerned about his name being on the birth certificate, all he had to do was ask. It is evident that the subject never arose.

Further, petitioner asserts that he did not register his intent to claim paternity with the Putative Father Registry because he did not know of its existence. That, however, is hardly Lorraine Robertson's doing. The age-old legal axiom is here appropriate: "Ignorantia legis neminem excusat," "Ignorance of the law excuses no one." The courts are not required to guess at a person's intentions or knowledge with respect to laws.

There being no natural fathers who

are deprived of an opportunity to ensure that they get notice of a proceeding to adopt, it cannot be said that DRL §111-a denies anyone equal protection of the law.

THE COURT HAS NOT ABUSED ITS DISCRETION

Petitioner argues that the court abused its discretion in not permitting him to participate in the adoption proceeding.

As noted earlier, abuse of discretion is not a permissible basis for vacating an order or judgment pursuant to CPLR 5015. Accordingly, this argument is not here properly before the court.

Further, as noted above, either petitioner was entitled by statute to participate in the proceeding or he was not. As a matter of law and common sense it cannot be said that the court

abused its discretion by failing to confer upon the petitioner a right that the Legislature saw fit not to grant.

The issue is clear. Did the court comply with DRL §111-a or did it not? There is no denial that DRL §111-a was fully adhered to.

It is also noted that the petitioner claims that the court abused its discretion by waiving the six-month waiting period prescribed by DRL §116. It is pointed out, however, that no waiver was necessary as there is no six-month waiting period applicable to this case.

DRL §116 states, in part, as follows:

> "1. When the adoptive child is less than eighteen years of age, no order of adoption shall be made until six months after the court shall have received the petition to adopt, except where the spouse of the adoptive parent is the natural parent of the child and the child has resided with the natural parent and adoptive parent for more than six months, such

waiting period shall not be required." (Underscoring supplied.)

It is not disputed that the infant has resided with Lorraine Robertson from birth and with Richard N. Robertson, Jr. since August, 1977. There being no waiting period required, the court did not have to make any waiver.

THE RECORDS OF THE PROCEEDING SHOULD REMAIN SEALED

Petitioner has no standing to request the opening up of the records of the adoption proceeding. He is not a proper party to this matter pursuant to DRL §111-a. He has not been determined to be the infant's father. He has given no evidence of fraud or misrepresentation whatsoever.

Further, the Department of Social Services investigative report and other proceedings are highly confidential and have not been shown even to Mr. and Mrs. Robertson or their attorneys. To reveal

such records on the basis of mere conclusory allegations and suspicions would constitute a gross invasion of privacy.

Domestic Relations Law §116 outlines the factors to be investigated and considered by the court in an adoption proceeding. The statute is clear that the investigation concerns itself with the fitness of the adoptive parent. Here Lorraine Robertson is the natural mother of the child. The only true adoptive parent is Richard N. Robertson, Jr. Accordingly, the petitioner's alleged relationship with Lorraine Robertson dating back several years, and Lorraine Robertson's entire social history dating back to her high school days (of which petitioner has no personal knowledge, it is pointed out) is entirely irrelevant to the investigation and cannot alter the findings made by Social Services. As the natural mother of Jessica, Lorraine

Robertson will remain the child's mother regardless of the investigation report or the outcome of any adoption proceeding commenced on her husband's behalf.

Accordingly, it is clear that the petitioner here is only seeking an opportunity to conduct the proverbial "fishing expedition" in order to manufacture further obstructions to the child's adoption. Such an endeavor should not be permitted.

FOR THE FOREGOING REASONS PETITIONER'S APPLICATION SHOULD BE DENIED IN ALL RESPECTS.

Dated: July 6, 1979.

S/
Jay L. Samoff

AFFIDAVIT OF LORRAINE ROBERTSON SWORN TO JANUARY 15, 1979

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY

IN THE MATTER OF THE ADOPTION BY

LORAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.

of
JESSICA MARTZ,

Adoptive Child.

AFFIDAVIT

STATE OF NEW YORK :
: ss.:
COUNTY OF ULSTER :

LORRAINE ROBERTSON, being duly sworn, deposes and says:

I am the natural mother of the above named adoptive child, and I have personal knowledge of the facts set forth herein. With resepct to the above named adoptive child I make the following averments:

There is no person adjudicated by a court of this state to be the father

of the child.

There is no person adjudicated by a court of another state or territory of the United States to be the father of the child.

There is no person who has timely filed an unrevoked notice of intent to claim paternity of the child pursuant to Social Services Law §372-c.

There is no person who is recorded on the child's birth certificate as the child's father.

There is no person who is openly living with the child and the child's mother at the time this proceeding is initiated and who is holding himself to be the child's father.

There is no person who has been identified as the child's father by the mother in written, sworn statement.

There is no person who was married to the child's mother within six

months subsequent to the birth of the child.

S/_____
Lorraine Robertson

Sworn to before me this
15th day of January, 1979.

S/_____
Jay Samoff
Notary Public, State of New York

(Jurat omitted in printing)

EXHIBIT B ATTACHED TO ANSWERING AFFIRMATION - SUMMONS DATED FEBRUARY 21, 1979 ADDRESSED TO LORRAINE ROBERTSON

Sec. 524 F.C.A. From 5-4 (Paternity)

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------:
In the Matter of the Paternity Petition of

JONATHAN LEHR
Petitioner

-against-

LORRAINE ROBERTSON
Respondent

----------:

Docket No. P-71-79

SUMMONS

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO:

LORRAINE ROBERTSON
DOCK STREET
MILTON, NEW YORK

A paternity petition under Article 5 of the Family Court Act having been filed in this Court; a copy of said petition being annexed hereto;

YOU ARE HEREBY SUMMOND TO appear before this Court at COUNTY COURTHOUSE 111 GROVE STREET, WHITE PLAINS, NEW YORK,

on MARCH 12, 1979 at 9:00 AM o'clock in the forenoon of said day to show cause why the Court should not enter a declaration of paternity, an order of support and such other and further relief as may be appropriate under the circumstances.

ON YOUR FAILURE TO APPEAR as herein directed a warrant may be issued for your arrest.

BY ORDER OF THE COURT

S/ Sylvia Lee Kingston
Deputy Clerk of the Court

Dated: FEBRUARY 21, 1979

State of New York
After 3 days return to
Sixth Floor Tower
111 Grove Street
White Plains, New York 10601

Westchester County

LORRAINE ROBERTSON
DOCK STREET
MILTON, NEW YORK

AFFIDAVIT OF LORRAINE ROBERTSON SWORN TO JULY 6, 1979

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY
----------X
In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

of

JESSICA MARTZ,

Adoptive Child.

----------X

AFFIDAVIT

STATE OF NEW YORK :
: ss.:
COUNTY OF ULSTER :

LORRAINE ROBERTSON, being duly sworn, deposes and says:

I am the natural mother of Jessica Robertson, my daughter who was born out of wedlock on November 9, 1976 and adopted by my husband, Richard N. Robertson, Jr., on March 7, 1979.

I have read the order to show cause dated June 22, 1979 and the papers

submitted in support thereof. The petition of Jonathan Lehr verified June 13, 1979 and the affidavit of Helen Lehr verified June 11, 1979 are entirely irrevelant and immaterial to this proceeding. They contain absolutely no facts which, if true, establish that I or anyone else committed any fraud upon the court. Further, they establish no facts which demonstrate that Mr. Lehr was entitled to notice of the adoption proceeding pursuant to Domestic Relations Law §111-a.

The history of my high school career, my relationship with Jonathan Lehr, and other matters about my past have absolutely nothing to do with the issues before this court. The only relevant issues are whether or not any fraud was committed upon the court, and whether or not the New York adoption law is unconstitutional as applied to this case.

These issues are more fully discussed in my attorney's affirmation submitted herewith.

Neither Mr. Lehr nor his mother, Helen Lehr, have given evidence of any fraud, error, misstatement, misrepresentation or the like made on my part. In fact, there is no denial nor any question of the fact that each and every statement made in my affidavit of January 15, 1979 is true and correct, and that pursuant to DRL §111-a Mr. Lahr was not entitled to notice of the adoption proceeding. A copy of my affidavit of January 15, 1979 is annexed to my attorney's affirmation as Exhibit A.

While Mr. Lehr's petition and Helen Lehr's affidavit are entirely irrelevant to the issues, I note that they contain a litany of half-truths, misleading statements and false innuendoes. I do not find it necessary to respond to

this shotgun attack upon my credibility, but the following is a brief indication of just some of the misrepresentations made by the petitioner.

Mr. Lehr impugns my emotional state, but fails to inform the court that several years ago--prior to the birth of Jessica--I was deeply upset over the death of my father in Vietnam, my rejection by my mother and her new husband, the illness of my brother, and my own loss of a child through miscarriage. In fact, I was not a patient at any hospital for any psychiatric condition as noted by Mr. Lehr. I was merely given emergency room treatment at a hospital for my miscarriage. While I was for a very brief time consulting with a social worker as an outpatient at a clinic my visits there were discontinued when my doctor told me that he did not think I was neurotic, but was only suf-

fering from temporary emotional distress. He said that emotional depression often results after a woman has a miscarriage.

Contrary to the assertions of Mr. Lehr and his mother, all was not happiness between us. As a matter of fact, Mr. Lehr and I were nearly always quarreling, thereby contributing to my unhappiness. I point out that since Mr. Lehr and I separated for good in late September or early October, 1976, I have had no semblance of the emotional turmoil and unhappiness that had once plagued me while I was involved with Mr. Lehr.

It should be noted that when I was rejected by my mother and stepfather, Helen Lehr became my guardian and surrogate mother. She took me and my older daughter, Renee, into her household. It was then that I met her son, Jonathan.

Although I did spend time living with Jonathan Lehr prior to the birth of

Jessica in November, 1976, at no time thereafter did I live with him. Further, Mr. Lehr exaggerates the amount of time I actually did spend with him. In fact, I did not live with him for more than four months in any one stretch during the two years immediately prior to the birth of Jessica.

It is clear, however, that Mr. Lehr may have developed an attachment to my oldest child, Renee, during this period. I suspect his motive for pursuing this matter is to maintain contact with me and Renee through Jessica.

I point out that Jonathan Lehr knew of my whereabouts at all times (except for a period of a few weeks when I had moved from one residence to another in early 1977) until my marriage to Richard N. Robertson, Jr. in August, 1977. Not once during that period did he ever ask about or show any interest in

Jessica. He certainly never lived with her, he never supported her, he never took care of her, he never made her a home, and he never attempted to establish any relationship with her at all.

In fact, Mr. Lehr repeatedly stated that he was not interested in Jessica but only wanted to visit with Renee. I permitted him to visit with Renee on three or four occasions, but when on one occasion Mr. Lehr threatened to kidnap Renee, I told him to stay away or I would call the police.

Mr. Lehr's assertions to the contrary notwithstanding, I did not run away from White Plains and hide from him. He visited with Renee while I was living in Milton long after I moved from Westchester County. Further, I was not running away and hiding when I moved to Apple Valley in Middle Hope, New York in August 1977. I had just gotten married, and my

husband and children and I naturally wanted to settle down and make a home for ourselves. I had no duty to report my whereabouts to anyone.

When I moved back to Milton, New York in the spring of 1978, Jonathan Lehr knew quite well where I was. In fact, on several occasions he would park in front of my house on Dock Road and wait for me or Renee. He repeatedly told me that he only wanted to see Renee and that he had no interest in Jessica at all. I refused to let him see Renee because he had threatened to kidnap her.

After about June, 1978 I did not hear from Mr. Lehr at all until his lawyer wrote to me some six or seven months later. By that time, however, my husband had determined to adopt both of my children, Renee and Jessica, and we commenced these proceedings.

The half-truths and false suspi-

cions contained in the moving papers should not be given any consideration. In any event, even if true they do not establish that any fraud was committed upon the court.

Finally, I repeat and reiterate that I have never conceded in any court proceeding anywhere, nor do I now concede for the purposes of this proceeding, that Jonathan Lehr is the father of my child. The paternity proceeding he commenced in Westchester County has been dismissed.

S/_____
Lorraine Robertson

Sworn to before me
this 6th day of July, 1979.

_____
Jay Samoff
Notary Public, State of New York

(Jurat omitted in printing)

AFFIDAVIT OF ALLAN GREEN SWORN TO
JULY 5, 1979

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY
----------X

In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

of

JESSICA MARTZ,

Adoptive Child.

----------X

AFFIDAVIT

State of New YORK :
: ss.:
County of Ulster :

Allan Green, being duly sworn, deposes and says:

I am 35 years old and reside at R.D. 1, Box 44B, Milton, New York.

I have known Lorraine Robertson for approximately 15 years and I first met Jonathan Lehr in about 1975.

In the early part of 1977 Lorraine

had recently moved from her residence at Sands Avenue in Milton, New York to a new residence at Dock Road, Milton, New York. At that time Jonathan Lehr telephoned me to convey a message to Lorraine.

Mr. Lehr stated that he desired to see Lorraine's older daughter, Renee. He expressed a concern that Renee was being deprived of his affections and was suffering because of it. He stated that he was the only "father" that Renee ever knew, and that it was wrong of Lorraine to deprive him of seeing her.

Mr. Lehr specifically stated that he had no interest in Jessica, that he had never known her, and that he had no feelings for her. He repeated that his only interest was in seeing Renee. I told him that I would convey the message.

Mr. Lehr and I talked for a rather long time, and the longer we talked the more it became apparent that he was at-

tempting to hurt Lorraine. His attitude, while at first was reasonable, became more and more concerned and obsessed with hurting Lorraine. He became bitter and appeared to want only to "get even" with Lorraine for leaving him.

At no time did he show any concern for or interest in Jessica.

S/_____

Sworn to before me
this 5th day of July, 1979

_____
Notary Public
Jay Samoff
Notary Public, State of New York

(Jurat omitted in printing)

AFFIDAVIT OF JENNIFER LOHR SWORN TO JULY 5, 1979

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY
----------X

In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

of

JESSICA MARTZ,

Adoptive Child.

----------X

AFFIDAVIT

STATE OF MASSACHUSETTS :
: ss.:
COUNTY OF MIDDLESEX :

JENNIFER LOHR, being duly sworn, deposes and says:

I am 27 years old and reside at 154 Standish Road, Watertown, Massachusetts. I am a registered nurse. I have personal knowledge of the facts set forth herein.

I have known Lorraine Robertson

nee Martz since 1973 and Jonathan Lehr for several years dating back to about 1976. In fact, for a time Lorraine and I lived together at 48 Marshall Street, Poughkeepsie, New York.

During the period when I lived in New York I had many occasions to see and speak with Jonathan Lehr. Of my own knowledge I can say that he not only knew of the whereabouts of Lorraine at all times up until August, 1977, but he visited with Lorraine's oldest child, Renee, on several occasions during that period.

I personally accompanied Jonathan on one occasion when he took Renee to church. On at least one or two occasions he even picked Renee up at my residence in Poughkeepsie in order to take her on an outing.

To my knowledge he never demonstrated any deisre to visit with Lorraine's other child, Jessica. As a mat-

ter of fact, on several occasions--I daresay, many--Jonathan Lehr stated to me that he had no interest in Jessica and only was concerned about Renee. On one such occasion, at St. Francis Hospital in New York, Jonathan told me that proof of the honorableness of his intentions was that he did not want to see Jessica, but that he was only interested in Renee. I did not then, nor do I now, understand what this meant.

In any event, of my own knowledge I can say that Jonathan never bothered to ask about or otherwise show any interest in Jessica.

S/_____
JENNIFER LOHR

Sworn to before me this
5th day of July, 1979.

S/_____
Notary Public
7/7/83
(Jurat omitted in printing)

REPLY AFFIRMATION OF DAVID J. FREEMAN, ESQ., DATED AUGUST 7, 1979

FAMILY COURT : STATE OF NEW YORK
COUNTY OF ULSTER

In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.

of an adoptive child having the first name of JESSICA, whose full name is contained in the Schedule annexed to the Petition herin.

REPLY AFFIRMATION

Docket No. A47-78

DAVID J. FREEMAN, an attorney duly admitted to the practice of law in the State of New York, affirms the following to be true under penalty of perjury:

That the undersigned is the attorney of record for the petitioner, Jonathan Lehr, and is submitting this affirmation in opposition to the answering papers submitted by Lorraine Robertson

and her attorney, Jay Samoff, Esq., and in further support of petitioner's application for an order opening, vacating and/or setting aside the Order of Adoption herein, and for a further order unsealing the adoption records herein.

As will hereinafter be shown, the answering papers are devoid of any factual and/or legal arguments which would give this Court any basis to deny petitioner's application. In fact, the answering papers contain statements which bolster the arguments of the petitioner that indeed fraud was committed upon this Court during these adoption proceedings. What is most revealing, however, and as is more fully set forth in the affidavit of petitioner annexed hereto, is the failure of Lorraine Robertson to deny many of the factual allegations contained in the petition of Jonathan Lehr. The failure to deny such allegations under

oath clearly affects the credibility of Lorraine Robertson's conduct and statements.

In an effort to give this reply a semblance of continuity with the prior papers submitted to the Court, the undersigned will categorize his responses as set forth in the petition of Jonathan Lehr.

LEGAL BACKGROUND

Mr. Samoff, in his affirmation dated July 6, 1979, sets forth a "counter statement of chronology." It is respectfully submitted that such chronology is incorrect, misrepresentative and contains numerous omissions which, when revealed, clearly prejudice the position of Lorraine Robertson.

It should be initially pointed out that through Mr. Samoff's chronology, he attempts to lead this Court to believe that it was only after the commencement

of the adoption proceedings on December 21, 1978[2]. that Mrs. Robertson and Mr. Samoff first learned of petitioner's interest in the adopted child, Jessica. Mr. Samoff, on page 2 of his affirmation,[1] states:

> "The summons (petitioner's paternity petition) in the Westchester County proceeding, however, did not issue until February 21, 1979, and was served by mail on or about February 22, 1979. Prior to that date neither Mr. or Mrs. Robertson nor their attorney had any knowledge of the commencement of the filiation proceeding."
> (Emphasis added)

Mr. Samoff then goes on to state that he first advised Judge Elwyn of the filia-

1. Mr. Samoff failed to number the pages in his affirmation; however, if numbered, this statement appears on the second page.

2. This is the date the petition for adoption was verified. It is significant to note that Mr. Samoff in his answering affirmation omits the exact date that the proceedings were comenced although he had direct knowledge of the same.

tion proceeding on February 26, 1979. What Mr. Samoff conveniently fails to mention, however, is that prior to the time that Lorraine Robertson commenced the adoption proceedings, she had received a letter from the undersigned, as Jonathan Lehr's attorney, advising her of his interest in Jessica and threatening court action if no reply was forthcoming. (See page 4 of Jonathan Lehr's petition and Exhibit C annexed thereto.) Did Mr. Samoff or his client advise the Court of that letter? Was mention also made to the Court of a subsequent letter forwarded to Lorraine Robertson by the undersigned, which was refused by her? (See Exhibit C to Jonathan Lehr's petition.)

The relevance of this is clear. The facts speak for themselves: Lorraine Robertson was married on August 28, 1977, and no adoption proceedings were

brought for sixteen (16) months. Adoption proceedings were commenced within a few days after Lorraine Robertson received the undersigned's letter of December 12, 1978[3]. Indeed, this does not seem to be coincidence. In addition, according to Mr. Samoff's affirmation, we can only conclude that the Court was not made aware of the receipt of the undersigned's letter by Lorraine Robertson. Therefore, Lorraine Robertson again withheld relevant information from this Court.

Mr. Samoff then confuses this Court by attempting to show the chronology of the legal proceedings which have occurred in this matter. As will also be shown, he fails to fully apprise this Court of the nature of the decisions made.

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3. See footnote 2 infra.

As noted in Mr. Lehr's petition, the first knowledge that the undersigned received that there existed an adoption proceeding was on March 3, 1979, when the undersigned received in the mail an order to show cause signed by Judge Elwyn, staying the paternity petition and requesting a change of venue so that the paternity petition and adoption proceedings could be heard at the same time in one forum, to wit, Ulster County Family Court. Now, however, Mr. Samoff takes the position that he never intended that the two matters be heard together. (See page 2 of Mr. Samoff's affirmation.) It is respectfully submitted, however, that the original intent of Mr. Samoff quite clearly called for the proceedings (adoption and paternity) to be held together. In his affirmation of February 26, 1979, in support of said application for a change of venue, Mr. Samoff states on the

last page:

> "Since the Ulster County Family Court will necessarily be reviewing and passing upon the best interests of the child in connection with the adoption proceeding, it would be unjust, inefficient, superfluous, and an otherwise waste of time and money for another court to pass upon the same matter at the same time." (emphasis added)

Mr. Samoff also states in that affirmation that the adoption proceedings still had not been completed as the investigative reports had not been submitted to or reviewed by the Court.[4] Thus, it defies common sense and logic to assume that Mr. Samoff did not intend both proceedings to be held together. Thus, on March 7, 1979 when the undersigned called Judge Elwyn

4. It is interesting to note that Mr. Samoff contradicts this statement by stating in his answering affirmation, on page 2, that: "It was never intended that the two matters be held together, for the adoption hearing had already been completed." However, as noted above, the Court had still not received or reviewed the Investigative Report.

to advise him of a request for a stay in the adoption proceedings, he was shocked to learn that the Order of Adoption had been signed that very morning by Judge Elwyn, even though Judge Elwyn already stayed the paternity proceedings. Thus, in effect, Judge Elwyn had, on February 26, 1979, stayed petitioner's paternity proceedings in Westchester County based upon Mr. Samoff's original argument that the proceedings should be held together, but yet, during that stay, the Judge had signed the Order of Adoption with full knowledge of the existence of the paternity petition. (See Exhibit H annexed to petitioner's moving papers.) Thus, it became impossible for the two proceedings to be held together as Mr. Samoff's papers had indicated. Thus, when Mr. Samoff states that it was not Mr. Lehr's intention to have the proceedings held together, he is playing with words. In

fact, Mr. Lehr had no choice, as the adoption proceedings were completed before Mr. Lehr had a chance to serve answering papers in connection with said proceedings. Further, on page 3 of his answering papers, when Mr. Samoff states that:

> "The motion for a change of venue was denied, further keeping the two proceedings separate,"

he is further confusing this Court. When the motion for a change of venue was denied on March 29, 1979, the Order of Adoption had already been signed for three (3) weeks! Thus, there were not two proceedings pending.

Thus, the Court can now see the confusion which Mr. Samoff creates with his so-called "counter statement of chronology." In addition, Mr. Samoff, on page 3 of his affirmation, states that, in response to Lorraine Robertson's motion to dismiss the paternity petition, on June 20, 1979, the Hon. Vincent

Gurahian, Westchester County Family Court Judge, signed an order dismissing the paternity petition. What Mr. Samoff again conveniently fails to state is that the motion was granted without prejudice, the court being aware of these proceedings and desiring to await the results of this motion. A copy of said decision is annexed hereto and marked Exhibit A.

Thus, it is quite apparent from the real chronology, with no details or dates missing, that the adoption of Jessica was directly precipitated by the letter of the undersigned dated December 12, 1978, and that the Ulster Family Court was not made aware of Jonathan Lehr's interest until more than two and one-half (2-1/2) months later when the paternity petition was served, even though Lorraine Robertson knew of such interest from the very inception of the adoption proceedings. Thus, the fraud

and deception and failure to disclose was perpetrated on the Court right from the very beginning.

After Mr. Samoff gets through telling the Court of the many motions and legal proceedings which preoccupied the parties herein from December 21, 1978 (commencement of adoption proceedings) to June 20, 1979 (the date of the order dismissing the paternity petition without prejudice), he then turns 180 degrees and states that petitioner was guilty of laches in not bringing on this motion sooner. This argument is absurd. The words associated with laches are generally "unreasonable delay," resulting in a prejudicial change of position by the other party.[4a] This is certainly not

4a. Laches is also defined as "delay for such time as to constitute acquiescence." "such delay as would constitute abandonment of a claim;""want of activity in pursuing a claim." See Black's Law Dictionary-laches (annotations).

the case here. Lorraine Robertson has been constantly aware of the petitioner's position in these proceedings, especially in light of the numerous motions and affidavits which have been served in connection with this matter. Within two (2) days after a decision was rendered on the motion to dismiss the paternity petition, this application was brought on by order to show cause. Does this constitute laches? Certainly not! In addition, there was absolutely no prejudicial reliance by Lorraine Robertson or the adoptive child on any inaction or delay by petitioner, Jonathan Lehr. The fact that the child, Jessica, is three and one-half (3-1/2) months older from the time the Order of Adoption was signed to the commencement of these proceedings certainly cannot be considered as prejudicial or having a detrimental affect upon the child. In addition, the adopt-

ive parents also have been aware all along of petitioner's position and his intent to take whatever steps are required to secure his rights.

To show the absurdity of Mr. Samoff's argument of laches, he states on page 3 that petitioner waited too long by waiting four (4) days (March 3 to March 7) to phone Judge Elwyn for a stay. Four days! - Two of which were Saturday and Sunday! Indeed, the undersigned worked over the weekend and the two week days in order to prepare the papers for a stay.

It is also amusing to see Mr. Samoff telling the Court that he told the undersigned to bring on this motion sooner. He cites letters that he wrote the undersigned, but does not attach one copy to the papers. The reason is that these letters do not exist. In April Mr. Samoff was too busy making a motion to dismiss the paternity petition and drawing

legal memorandums to be concerned with giving the undersigned any legal advice as to what procedure to follow. Perhaps Mr. Samoff should attempt to do some research into the constitutional issues involved in this motion to appreciate that one cannot draw a motion within his time framework.

It is also interesting to note that the Domestic Relations Law provides for a discretionary six (6) months' waiting period before an adoption becomes final. This is a good indication of how the courts feel in connection with what period of time would constitute a reasonable time for adoption proceedings to be abrogated voluntarily or otherwise.

The further arguments used by Mr. Samoff to support his laches argument, to wit, that the family grew closer together within that 3-1/2 month period and that Jessica's birth records have been

changed, have no merit. Their family had already been living together since August of 1978. Certainly, three (3) additional months are not crucial. Nor is the change of birth records crucial, since the child is not aware of any such records and those records could have been changed one week after the Order of Adoption was signed.

MISREPRESENTATIONS AND FRAUD OF LORRAINE ROBERTSON

On pages 5 through 9 of Mr. Samoff's affirmation, Mr. Samoff goes to great lengths to try to convince this Court that Lorraine Robertson did not perpetrate a fraud or did not deceive this Court in connection with the adoption proceedings. He even goes so far as to state that the prior factual history regarding the relationship of the petitioner, Jonathan Lehr, and the adoptive child is not relevant to the instant pro-

ceedings, his main argument being that since Jonathan Lehr was not entitled to any notice pursuant to the strict and limited provisions of Section 111A of the Domestic Relations Law, such history need not be revealed to the Court. The undersigned shall dissect Mr. Samoff's argument into categories, i.e. (1) the fraud question and (2) the notice provisions of Section 111A of the Domestic Relations Law.

First of all, with respect to fraud in these types of proceedings, the Court is respectfully referred to the decision of the Appellate Division, Fourth Department, in the Matter of the Adoption of Deborah E. Lord, an Infant, 28 App. Div. 2d 1203. There, in a motion similar to the instant one, the Appellate Division reversed a lower court order which had denied a motion to vacate an order of adoption. In its decision the Court ex-

pounded upon what constitutes sufficient fraud in order to open an adoption proceeding. The Court went to great lengths to indicate that in a delicate matter such as an adoption, out-and-out direct misrepresentation is not required. The Appellate Division stated in its decision as follows:

> "Apparently the Family Court Judge was under the impression that in order to constitute fraud in a matter of delicacy such as this there had to be an out-and-out, direct misrepresentation. This is not so. The matters of evasion, withholding information from the court, the failure to disclose in an open and fair manner certain material facts in relation to the history of the controversy and the prior conduct of the parties and the previous custody of the child (if there was in fact such a withholding, and it appears that there may well have been) would be sufficient to prompt the granting of the order. In a proceeding of this type full and complete disclosure of all material facts is required. Of course it cannot be ascertained definitely just what was divulged to the court until after the inspection which we have directed in Matter of Lord v. Joor (28 A D 2d 1202), but we may pre-

> sume that the material facts were not fully developed with candor in the petition for adoption, because if they had been it is inconceivable that the court would not have directed that notice be given to all interested parties beyond that required by the bare necessities of the statute." (Emphasis added)

It seems quite clear that the fact and circumstances of this case clearly meet the requirements of the Appellate Division in Lord.[5] As noted at the inception of this affirmation, Lorraine Robertson, in her answering affidavit, conveniently failed to deny many of the material allegations set forth in the petition of Jonathan Lehr, which allegations were very easily capable of being denied if, in fact, they lacked truth and veracity. As shown in the annexed affidavit of Jonathan Lehr, Lorraine Robertson has failed to deny the following allegations as set forth in Jonathan Lehr's peti-

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5.

tion:

1. She failed to deny the allegation contained on page 4 that the adoption proceedings were commenced only after she received the undersigned's letter of December 12, 1978.

2. She failed to deny the allegation contained on page 7 that she was thrown out of highschool.

3. She failed to deny the allegation contained on page 8 that she tried to take her own life.

4. She failed to deny the allegation contained on page 8 that she openly acknowledged to others that Jonathan Lehr was the father of Jessica. It should be noted here that in her answering papers, Lorraine Robertson merely states that she does not concede that Jonathan Lehr is the father. This is hardly a denial.

5. She failed to deny the allegation contained on page 9, which stated

that Lorraine Robertson had told the Department of Social Services that Jonathan Lehr was the father of Jessica.

6. She failed to deny the allegation contained on page 9, in which Mr. Lehr stated that he visited with Jessica when she was born during the hospital's fathers' visiting hours.

7. She failed to deny the allegation contained throughout Mr. Lehr's petition that she concealed the whereabouts of herself and the child, Jessica, although in her affidavit she claimed that this concealment was for a shorter period of time than Mr. Lehr alleges.

8. She failed to deny the allegation contained on page 10 that she asked Jonathan Lehr to marry her.

9. She failed to deny the allegation contained on page 11 that she had Jessica call Jonathan Lehr's mother "Grandma" and, further, that she confided

in Mrs. Lehr that Jonathan Lehr was indeed the father of Jessica.

10. She failed to deny the allegation contained on page 11 that Jonathan Lehr offered financial assistance to Jessica.

Thus, it is submitted, in light of these unrefuted allegations, that they are true and that, further, Lorraine Robertson did not disclose them to the Court. As noted above in the cite from the Appellate Division, it was Lorraine Robertson's duty to disclose, in an open and fair manner, material facts which related to the history of the controversy and the prior conduct of the parties. Certainly, the name of the father of the child was something that should have been disclosed in Court. Here it should further be pointed out that, assuming that Lorraine Robertson knew that Jonathan Lehr was the father, she committed an

open fraud upon the Court by introducing into evidence at the adoption proceedings the birth certificate of Jessica, which birth certificate omitted the name of the father.[6.] Thus, Lorraine Robertson deceived this Court into believing that the name of the father was unknown when, in fact, she knew who the father was and had acknowledged it to many other people, all of which is undenied by Lorraine Robertson.

The Court is further respectfully referred to Section 116 of the Domestic Relations Law, which requires a full investigatory report to be made of the adoptive parents, including their mental wellbeing. Certainly, Mr. Lehr's factual background, as contained in his petition, should have been disclosed. It is se-

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6. Copy of birth certificate is annexed to the moving papers and marked exhibit F.

verely doubted that it was, especially in the light of Mr. Samoff's statement on page 1 of his affirmation, where he states:

> "At the hearing the only two witnesses were Mr. and Mrs. Robertson. The inquiry was conducted entirely by the Court, and Mr. and Mrs. Robertson merely confirmed the contents of their petition." (Emphasis added)

Thus, it appears quite apparent that Lorraine Robertson did not offer to the Court any of the additional information set forth in Jonathan Lehr's petition.

Finally, Mr. Samoff tries to get around the whole issue by saying that the mother was not under a duty to disclose the name of the father. It seems quite illogical to presume that in an adoption proceeding where parentage of the child is of utmost importance in view of notice requirements, both to wed and unwed fathers, the issue of whether or not there is a known father of the child should not

be disclosed. Indeed, as the court in Lord stated:

> "...it is inconceivable that the court would not have directed that notice be given to all interested parties beyond that required by the bare necessities of statute."

It is submitted that the court was directly referring to a situation similar to the instant one, where a person interested in the proceedings, and, certainly, Mr. Lehr, having filed a paternity petition, was an interested party, was not notified but was known by either of the adoptive parents and Court! Thus, Mr. Samoff's statement on page 7 of his affirmation that the mother was not under a duty to disclose the name of the father is certainly not applicable to an adoption proceeding where disclosure is of utmost importance in order to determine the best interests of the child.

With respect to Mr. Samoff's second argument that Lorraine Robertson

would not have to disclose because Mr. Lehr was not entitled to notice pursuant to Section 111-a of the Domestic Relations Law, we submit that this argument not only lacks merit but also contradicts the intention of the statute. It is significant to note that when Section 111-a was adopted, Governor Carey, in approving Section 111-a, stated in an address on July 24, 1976,[7] that the statute had problems in connection with its limited notice provisions. Governor Carey recognized the incompleteness of the statute when he stated in that address:

> "While on balance, the bill largely accomplishes its aims of achieving finality as early as possible in a child's life in the establishment of the rights, interests and obligations of all parties, its failure to provide adequate provisions for notifying putative fathers of proceedings affecting the child is troubling ....
>
> "The sponsors of this bill

7. See exhibit B annexed hereto.

> recognize that its notice provisions could be improved and have agreed to make amendments extending the time for the putative father to respond. Since the bill does not take effect until the first day of January, I am confident that remedial legislation can be enacted early in the next legislative session to address these problems." (Emphasis added)

Thus, it appears that this measure was only a stop-gap measure and that additional legislation would be forthcoming due to the inequities of the statute. Mr. Samoff in his affirmation attempts to lead this Court into believing that the Legislature went to great lengths to carefully draft and limit this statute to only a certain class of unwed fathers and that these limitations were for specific reasons. On the contrary, and had Mr. Samoff thoroughly reviewed the legislative history before making such statements, he would have found out this bill was developed by the Temporary State Commission on Child Welfare, whom Governor

Carey stated in his July 24, 1976 address:

> "This bill, developed by the Temporary State Commission on Child Welfare, attempts to set forth guidelines for notifying fathers of out-of-wedlock children of proceedings affecting their parental interests." (Emphasis added)

As can be seen from the foregoing, the bill merely attempts to set forth guidelines and not exclusive categories. As will hereinafter be shown, if, in fact, these guidelines were not waived by Lorraine Robertson, the intent of the guidelines was certainly met by the actions of Mr. Lehr.

Mr. Samoff goes to great lenghts in his affirmation to state that Mr. Lehr should have filed a notice to claim paternity in accordance with Social Service Law, Section 372-c. Aside from that procedure being unknown to most unwed fathers, it is significant to note what

that provision does. In effect, it gives at best, constructive notice to any court considering the adoption of a child of an unwed father. What we have in the instant case, however, is not constructive notice but actual notice given not only to Lorraine Robertson but to the Court as well, that Mr. Lehr was claiming paternity by the institution of a paternity proceeding. Certainly, the intent of Section 111-a, which is designed to give the court notice of a father claiming paternity, was more than adequately fulfilled in these circumstances, and, as the court in Lord stated, it is inconceivable that a court with such knowledge would stick by the bare necessities of the statute and not provide for notice to be given.

In addition, there is a severe question as to whether or not Lorraine Robertson is estopped from asserting the

constraints of Section 111-a of the Domestic Relations Law. As noted in the petition of Jonathan Lehr, it was Lorraine Robertson who acknowledged to third parties that Jonathan Lehr was the father and gave Mr. Lehr the impression that his name was on the birth certificate, which would have mandated the Court to give notice pursuant to Section 111-a.2(d). Further, Mr. Lehr's allegation, undenied by Lorraine Robertson, that she advised the Department of Social Services, when applying for welfare benefits, that Mr. Lehr was the father of Jessica, would also have complied with Section 111-a.2(f), which provides notice to be given where the mother has named the father on a sworn statement. Certainly, any application for welfare benefits would have required a sworn statement by Lorraine Robertson as to the name of the child's father. These

are questions which cannot be answered unless we have a full investigatory hearing in order to ascertain whether or not there was any waiver of this statute, assuming, arguendo, that the statute is constitutional.

Before addressing the constitutional arguments raised by Mr. Samoff, one additional comment must be made. On the bottom of page 6 and top of page 7 of Mr. Samoff's affirmation, he states as follows:

> "...the petition instead attempts to create an atmosphere of fraud by asserting that Lorraine Robertson should have disclosed to the court that there was a person 'out there somewhere' who is the natural father of the child and who should have been put on notice of the adoption proceedings. This is not true."

Certainly this statement does not apply to this case. Lorraine Robertson not only apparently knew who the father of Jessica was but she also was quite aware

of where he could be located. Indeed, she spoke with Jonathan Lehr's mother, Helen Lehr, numerous times and even spoke to Jonathan Lehr at his mother's home.[8.]

DENIAL OF CONSTITUTIONAL RIGHTS

The undersigned shall now turn his attention to the constitutional arguments used by Mr. Samoff. Mr. Samoff divides such arguments into two categories: (1) the constitutionality of Section 111, and (2) the constitutionality of Section 111-a.

With respect to Section 111, Mr. Samoff tries first to state that it concerns only consent and not to notice. It is petitioner's contention that Section 111 is unconstitutional in that it dis-

8. See Jonathan Lehr's petition, paragraph 18, page 11, and Helen Lehr's affidavit, page 4. It should be noted that none of these allegations were denied by Lorraine Robertson in her answering affidavit.

criminates as to unwed fathers and unwed mothers,[8a.] and once that discrimination is established, then the notice requirements directly follow. If the consent of an unwed father is required to an adoption, then it follows that notice of a proposed adoption must be afforded to all unwed fathers. In Caban v. Mohammed, supra, the Supreme Court rejected the argument used by the New York Court of Appeals In Re Malpica-Orsini, 36 N.Y. 2d, 568 that consent should not be required of unwed fathers because of the alleged attendant difficulties in locating the father. Instead, the Caban Court concluded that the legislature should deal with that problem, but that it cannot be used as a reason for discriminating between

8a. Said section also discriminates between married and unmarried fathers a question which Caban does not deal with.

unwed fathers and mothers. Section 111 is still another example of "overbroad generalizations" in gender-based classifications.

What is perhaps most disconcerting about Mr. Samoff's "analysis" of the Caban decision is his usage of the dissenting opinion of Mr. Justice Stevens as the holding of the case and trying to imply that the majority agrees with the minority view where there is no expressed disagreement by the majority. First of all, Mr. Samoff on page 10 of his affirmation attempts to use an incomplete quote from Justice Stevens' dissent in standing for the proposition that Section 111 is only unconstitutional where there is an adoption of an older child and the father has a substantial relationship and the father is willing to admit paternity. This view by the minority was clearly rejected by the majority

and in no way limited the unconstitutionality of Section 111. Indeed, the majority opinion of the Court, in its dicta, tries to give the legislature some areas to consider different treatment for unwed fathers, but the Court clearly and without equivocation states that the "inflexible gender-based distinction" contained in Section 111 is unconstitutional.

When Mr. Samoff talks of an adoption of older versus younger children, and the establishing of a relationship between the unwed father and the child, he is referring to dicta and not to holding. Indeed, the Court acknowledges in its majority decision that they are expressing no view on this. In footnote 11 the Court states

> "Because the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgement of

> of paternity or a stricter definition of abandonment."

Thus, the fact that Jessica is old or young has no bearing on the fact that Section 111 is unconstitutional. In fact, however, it should be noted that the majority opinion in its dicta seemed quite concerned about affording unwed fathers their constitutional right to consent where the adoption of younger children is sought, which is precisely the case here.

In addition, it should be pointed out that Mr. Samoff's argument that Mr. Lehr had no relationship with Jessica is entirely misplaced. Granted, Mr. Lehr was not able to have a close relationship with Jessica, but whose fault was it? As noted in Mr. Lehr's petition, and undenied by Lorraine Robertson, Mr. Lehr (1) saw Jessica whenever he was "permitted" to by Lorraine Robertson, and (2) offered

to set up a trust fund for Jessica. The fact that the relationship could not be closer was due directly to the concealment of Jessica's whereabouts by Lorraine Robertson and her threats to call the police if Jonathan Lehr persisted in trying to see Jessica. Indeed on the fourth page of Lorraine Robertson's affidavit in explaining her moves, she states

"I had no duty to report my whereabouts to anyone." Thus, while a factual dispute exists as to how long Lorraine Robertson concealed her and Jessica's whereabouts from Jonathan Lehr, there is no question that there was such concealment for a significant period of time. Further, it cannot be denied that whenever Jonathan Lehr had the opportunity and/or "permission" to see Jessica he did so.

With respect to whether or not the Caban decision is retroactive, the major-

ity opinion expressed no view. It is submitted, however, that in cases such as the instant where there has been alleged fraud, deception, and misrepresentations, the case must be retroactively applied in order to avoid a gross inequity to Mr. Lehr.

In concluding his argument as to the constitutionality of Section 111, Mr. Samoff states that the opinion of Mr. Justice Stevens, while "labeled" a dissent, is really not in dissent but merely applies the majority opinion. He further states "the majority opinion is not in disagreement therewith." Initially, it should be noted that the Justice(s) writing for the majority do not "reply" to a dissenting opinion and the fact that the majority opinion does not disagree with statements made in the dissent should not be deemed as acquiescence to the minority view as Mr. Samoff

would have the Court believe. If the majority wanted to address itself to issues which the dissent addresses itself to, i.e., retroactively, it certainly would have done so.

In conclusion, therefore, it appears that the applicability of Caban, supra, with respect to retroactivity would be left to each individual case, and that it is submitted that the facts and circumstances of this case warrant its application. In addition thereto, it is submitted that the limitations which the dissent tries to impose upon the majority opinion in Caban, supra, has no application, and cannot be taken into consideration. The Caban Court quite clearly in its holding as opposed to its dicta states:

> "In sum, we believe that Section 111 is another example of 'overbroad generalizations' in gender-based classifications.... The effect of New York's classifica-

> tions is to discriminate against unwed fathers.... Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests." (emphasis added)

Thus, the conclusion of the Court is not limited in any manner whatsoever. In fact, the above quoted portion of the decision appears to be right on point in the instant case. Here it appears we have an alienated mother attempting to cut off the parental rights of Mr. Lehr. She intentionally, according to Mr. Lehr, left his name off the birth certificate while acknowledging to others as well as Mr. Lehr that he was the father; she concealed her whereabouts and the whereabouts of the child for a period of time;

and she has failed to deny that he is the father. Certainly this can be considered as an attempt to arbitrarily cut off Mr. Lehr's rights. On the other hand, Mr. Lehr has made every effort to establish a relationship with his daughter Jessica; however, Lorraine Robertson, being what the Caban Court described as an alienated mother, has excluded Jonathan Lehr from full participation in the decision as to whether or not Jessica should be adopted. With respect to the argument of the constitutionality of Section 111-a, Mr. Samoff raises no valid arguments which would sustain the arbitrary classification that only certain unwed fathers are to receive notice. While Mr. Samoff, on page 12 of his affirmation, states that Section 111-a "does not make arbitrary distinction and it affords all fathers of out-of-wedlock children an opportunity to receive notice of an adoption pro-

ceeding," this is clearly not a correct reading of the statute. One simple example will suffice. A mother openly acknowledges to all people that "x" is the father of the child but fails for whatever reason to acknowledge this in writing in a sworn statement, or to place his name on the birth certificate. In addition, the father does not, for whatever reason, conform with the other requirements of Section 111-a, to wit, files in the Putative Father Registry, or had been adjudicated as the father of the child, or is not living with the child, or the child's mother. In such a case there is no question as to the paternity of the child, yet the father is not entitled to notice.

Mr. Samoff further supports the petitioner's equal protection argument by stating on the 12th page of his affirmation that adjudicated fathers stand in a

different position than a father whose rights have not been lawfully adjudicated. Is an adjudicated father any more a father than one who is not? The U. S. Supreme Court, in Stanley v. Illinois, 405 U.S. 645, certainly did not think so. In that case, the U. S. Supreme Court held that the parental rights of an unwed father (non-adjudicated) could not be terminated without proof that the father was unfit. This is precisely what happened in the instant case where a non-adjudicated father had his parental rights terminated without being shown to be unfit, clearly a denial of due process and equal protection.

Mr. Samoff further states that since all unwed fathers can file in the Putative Father Registry, there is no denial of equal protection. This argument lacks merit. What of a situation where a father is told by the mother that he is

listed on the birth certificate - why would the father file in the Registry? In addition, what of the distinction which Section 111-a makes with respect to unwed and wed fathers: Notice must be given to wed fathers (as well as to wed and unwed mothers); and, also certain unwed fathers are entitled to notice. What is the justification for this distinction? Indeed, there is none and that is why the Caban Court declared Section 111 unconstitutional and why Section 111-a should also be declared unconstitutional.

Mr. Samoff further argues that Mr. Lehr was never led to believe that his name was on the birth certificate. A review of both Mr. Lehr's petition coupled with the failure to deny by Lorraine Robertson, shows this not to be the case. According to Jonathan Lehr, Lorraine told everyone that Jonathan Lehr was the father and told Welfare that Jonathan Lehr

was the father. Thus, why should Mr. Lehr have thought to question the birth certificate? It is submitted that Mr. Lehr could reasonably assume that his name was on the birth certificate. The fact that Welfare benefits were received under Martz (Lorraine's maiden name) is not surprising as in unwed situations it is not uncommon for the illegitimate child to assume the mother's maiden name.

It appears from the foregoing, therefore, that Mr. Lehr was deprived of his consitutional rights. His parental rights were substantially terminated by reason of the adoption; yet, he was not given the opportunity to be heard nor was he proven to be unfit as a father. Instead, the Court, having knowledge of the existence of a paternity petition, presumed that Mr. Lehr was unfit (assum-

ing he was the father).[4] Taking this argument one step further, it appears that Section 111-a has presumed that all unwed fathers who do not fall within one of the categories, are unfit. Therefore, since unwed fathers are not entitled to notice, they have been denied due process by presumption rather than proof. Substantive due process requires that a parent be proven unfit before his parental rights are terminated and procedural due process requires a hearing on the issue of unfitness.[5] Mr. Lehr was denied

4. The Caban case did not touch upon this issue of substantive due process since it was decided on the equal protection argument.

5. In Doe v. Department of Social Services, 71 Misc. 2d 666, 337 N.Y.S. 2d 102 (Sup. Ct. 1972) the court held that where there is no issue as to paternity the father of an illegitimate child must be notified of an impending adoption. In light of Lorraine Robertson's failure to deny that Jonathan Lehr is the father herein, it appears that there is no issue to paternity and that therefore Doe applies

both.

With respect to the equal protection argument, it is submitted that once parental interest is established, no reason exists for discriminating or distinguishing between the rights of an unwed mother and an unwed father. Here Mr. Lehr certainly had sufficient parental interest, to wit, the institution of paternity proceedings. His rights, therefore, should have been the sams as Lorraine Robertson's. Section 111 and Section 111-a arbitrarily and without basis took away those rights by treating Mr. Lehr differently. Caban stands for the proposition that Section 111 is unconstitutional because it treats unmarried parents differently according to their sex. This argument can easily apply to Section 111-a which also treats unmarried parents differently because of sex, to wit, unwed mothers automatically get notice of adop-

tion proceedings (since they must consent), while not all unwed fathers get such notice (unless they comply with the requirements of 111-a which have no rational basis). The failure of Section 111 and Section 111-a to afford Mr. Lehr a hearing on his parental qualifications, while extending it to other parents (to wit, unwed mothers and married parents), denies Mr. Lehr equal protection under the law.

Therefore, it is respectfully submitted that on the basis of the Stanley case, supra, Caban case, supra, and the cases cited therein, that the application of Section 111 and/or Section 111-a in this case have denied the petitioner, Jonathan Lehr, his constitutional rights of due process and equal protection under the law.

ABUSE OF DISCRETION, FAMILY COURT ULSTER COUNTY

Mr. Samoff argues on the 14th page of his affirmation that abuse of discretion is not a permissible basis for vacating an order of adoption, and he cites CPLR 5015 as a basis for his argument. First of all, it is submitted that Section 114 of the Domestic Relations Law permits such an order to be opened by virtue of an abuse of discretion. Section 114 reads:

> "In like manner as a court of general jurisdiction exercises such powers, a judge or surrogate of a court in which the order of adoption was made may open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause." (emphasis added)

It is submitted that other sufficient cause encompasses abuse of discretion. In an adoption proceeding, the Court must exercise its discretion in a number of ways which include, but are not limi-

ted to: selection of a disinterested person to make an investigation (DRL 116); review of such report; waiver of six months' residency request. In the instant case, the Court, being aware of Mr. Lehr's paternity petition prior to signing the order of adoption, should have either stayed the adoption proceedings pending completion of the paternity proceedings, or permit Mr. Lehr to participate in the adoption proceedings. As the Appellate Division in Lord, supra, stated

> "...it is inconceivable that the court would not have directed that notice be given to all interested parties beyond that required by the bare necessities of the statute." (emphasis added)

Thus, while Mr. Samoff takes the position that the Court was right in following the bare necessities of the statute, the Appellate Division, Fourth Department, has implied that this would be unacceptable. It therefore follows that there is an a-

buse of discretion. Further, in light of the paternity proceeding which was pending at the time the order of adoption was signed, it is submitted that the Court should not have waived the six months' rule. It should have realized that Mr. Lehr either during or after the paternity proceeding would have asserted his rights as the natural father. Other courts have also passed upon this discretionary power of the court. See In Re Bruce, 53 N. Y.S. 3d, 502 where the court held that there was an abuse of discretion in waiving the six months' requirement. See also In Re Brundage, 134 N.Y.S. 2d, 703.

With respect to the unsealing of the adoption records, the Court is respectfully referred to the decision of the Appellate Division, Fourth Department, In the Matter of Lord, 28 App. Div. 2d, 1202, where the court unanimously reversed a lower court ruling, denying an

examination and inspection of sealed adoption records. As a matter of fact, said motion was decided together with a motion to vacate an order of adoption which was decided simultaneously. The court there wisely permitted the examination and inspection to take place prior to the hearing on the application to vacate.

Thus it appears quite clear that Mr. Lehr has standing to open these records, especially in light of Lorraine Robertson's failure to deny that he is the father of the adotpive child, Jessica.

In conclusion, therefore, it is submitted that the answering papers of Mr. Samoff and Lorraine Robertson not only fail to deny the material allegations of the petitioner, but also fail to set forth any substantive reasons why this Court should not grant in all re-

spects the petitioner's application. Notwithstanding the question of the retroactive effect of the Caban decision, this Court has the obligation to follow the line of decisions which culminated in Caban, which have all expended the rights of unwed fathers so as to equate them not only with the rights of unwed mothers, but also with the rights of married parents as well. There is no basis in law or in fact, or indeed there is no compelling State interest which would warrant such different treatment, especially where the ultimate result is the termination of parental rights.

WHEREFORE, the undersigned respectfully requests this Court grant in all respects the application of the petitioner herein, and further, that the Court grant such other and further re-

lief as may be proper.

Dated: August 7, 1979.

S/_____
David J. Freeman, Esq.

REPLY AFFIDAVIT OF JONATHAN LEHR, SWORN TO AUGUST 7, 1979

FAMILY COURT : STATE OF NEW YORK
COUNTY OF ULSTER

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In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

of an adoptive child having the first name of JESSICA, whose full name is contained in the Schedule annexed to the Petition herein.

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REPLY AFFIDAVIT

Docket No. A 47 48

STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

Jonathan Lehr, being duly sworn deposes and says:

That your deponent is the petitioner herein and is submitting this affidavit in reply to the answering papers submitted by Lorraine Robertson and her attorney, Jay Samoff, Esq., and in support of his application for an order set-

ting aside, vacating and/or opening the order of adoption entered in these proceedings and for a further order unsealing the adoption records so that they may be inspected to determine whether or not Lorraine Robertson, the natural mother, has misrepresented and withheld information from the Court during said adoption proceedings.

That your deponent has carefully read the affidavit of Lorraine Robertson and those of her two friends, Allan Green and Jennifer Lohr. That your deponent smbits that these affidavits follow the trend which has been established by Lorraine Robertson throughout these entire proceedings which trend consists of misrepresentations, deception and a failure to meet head-on the very issues which are the heart of this application.

Perhaps the most glaring omission from all of the answering papers is the

failure on the part of Lorraine Robertson and/or her friends to deny that your deponent is Jessica's father, and her failure to deny many of the material allegations of your deponent's petition.[1] While Lorraine attempts to circumvent these issues by calling them irrelevant to the instant proceedings, it is submitted that this is merely a subterfuge used by Lorraine in order not to commit perjury.

As noted previously, your deponent's attorney in his affirmation has indicated to this Court the main allegations of your deponent's petition which were undenied and unrefuted by Lorraine Robertson. Rather than discuss those, your deponent will deal with those portions of Lorraine's affidavit which merit

1. See reply affirmation of David J. Freeman, Esq., pages 10-12.

a response due to their misrepresentative character.

On the second page of Lorraine's affidavit (pages are not numbered) she becomes defensive about your deponent's account of her emotional state during our relationship. It should initially be pointed out to the Court that the purpose of your deponent's account of his knowledge of Lorraine's emotional history was to merely apprise the Court that she did suffer from some emotional trauma. Your deponent felt quite strongly that this type of information would have been relevant during the adoption proceedings, and your deponent has been advised by his attorney that Section 116 of the Domestic Relations Law specifically refers to the fact that an investigation should be made into the physical and mental health of

the adoptive parents.[2] Thus, while your deponent does not feel that detailed responses are required to some of the comments in Lorraine's affidavit regarding her emotional state, your deponent feels constrained to point out to the Court certain areas where Lorraine is taking advantage of the Court's lack of knowledge of the true and actual facts.

Lorraine indicates that her emotional problems were due to her father's death; yet she fails to apprise the Court that her father's death occurred approximately ten years prior to the birth of Jessica. Further, she tries to confuse this Court with respect to treatment at

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2. It should be noted here that in the petition for adoption filed by Lorraine Robertson she is referred to as the adoptive mother and even if this were not the case, the generality and broadness of Section 116 would certainly call for an investigation into the physical and mental history of the natural mother.

the hospital for her miscarriage. She fails to state, however, that she was treated in the White Plains hospital because of the apparent attempt to take her own life and that she was in an extreme emotional state. Once again, the relevance of this is for the Court to determine only after the adoption proceedings are opened and a full investigation made as required by the Domestic Relations Law.

It is also interesting to note that Lorraine attempts on the third page of her affidavit to belittle our relationship by saying we were always quarreling. She does not, however, deny your deponent's statement made in his petition that <u>after</u> the birth of Jessica, she had asked your deponent to marry her! Once again, by failing to encompass the entire background in this matter, Lorraine has attempted to take matters out

of context and confuse the Court.

Lorraine also goes to great lengths to indicate to the Court that your deponent had a close relationship with Renee, Lorraine's other child, who was also born out-of-wedlock. This is entirely true. As your deponent indicated in his petition, he felt almost like a father toward Renee as he had lived with her and Lorraine for almost two years. It should be pointed out that the affection was mutual, and Renee cared for your deponent a great deal. At all times when your deponent attempted to visit with Jessica, he would also make a great effort to visit with Renee, as at that time Jessica was but an infant and could not relate to your deponent in the way Renee could. At no time, however, did your deponent ever give up an opportunity to visit with Jessica, but was forbidden from seeing her by Lorraine.

Lorraine also tries actually to deceive this Court by stating, on page 3 of her affidavit, "I point out that Jonathan Lehr knew of my whereabouts at all times (except for a period of a few weeks when I had moved from one residence to another in early 1977) until my marriage to Richard N. Robertson, Jr. in August 1977." First, it should be pointed out that your deponent did not know the whereabouts of Lorraine or Jessica from shortly after the birth of Jessica until approximately six months thereafter when Lorraine divulged that she was living in Milton, New York, and your deponent went up there for four weekends. Therefore, it was impossible for your deponent to live with her, support her, or take care of her. As noted previously, your deponent did wish to set up a trust fund for Jessica, and further, did visit with her whenever Lorraine would permit

it. Your deponent categorically denies Lorraine's statement that he was only interested in Renee and not Jessica, and that your deponent threatened to kidnap Renee. This was never the case. She also indicates that when she moved to Milton in the spring of 1978, your deponent knew where she was. Nothing could be further from the truth. Your deponent did not even know her name as she already had been married. Thus, from the summer of 1977 when Lorraine got married, to August of 1978, your deponent did not know Lorraine's whereabouts. Once again, Lorraine gets her chronology mixed up when she states your deponent spoke with her in the spring of 1978. That was actually in the spring of 1977, one year prior. Lorraine also says she did not hear from your deponent until his attorney wrote some six or seven months after June of 1978. Lorraine, however, once

again fails to remember that we spoke on the phone at your deponent's mother's house during that period of time. This is not denied by Lorraine as stated in the affidavit of Helen Lehr.

As her attorney, Mr. Samoff, has done in his affirmation, Lorraine Robertson is extremely vague with her dates. On the bottom of page 4 of her affidavit, she attempts to have this Court believe that the adoption proceedings were commenced before she received your deponent's attorney's letter of December 12, 1978. She states

> "After about June 1978 I did not hear from Mr. Lehr at all until his lawyer wrote to me some 6 or 7 months later. By that time, however, my husband had determined to adopt both of my children, Renee and Jessica, and we commenced these proceedings." (emphasis added)

As noted previously, these adoption proceedings were not commenced until after that letter was received.

The relevancy of both Lorraine's chronology and that of your deponent is not necessarily how long Lorraine concealed the whereabouts of herself and Jessica, but the fact that she did in fact conceal such whereabouts from your deponent. It is submitted that whether she concealed them for 10, 12, or 15 months, as your deponent contends, is not the point. The fact in point is that when she did not conceal her whereabouts, your deponent made every effort to visit with Jessica, and your deponent would have made further efforts to visit with Jessica as well as with Renee at any opportunity; however, after Lorraine married in August, 1977, and for more than one year thereafter, Lorraine chose not to permit your deponent to visit with his daughter.

Perhaps what is most revealing about the shortcomings of Lorraine's affi-

davit can be seen in the last paragraph thereof where she states

> "...that I have never conceded in any court proceedings anywhere, nor do I now concede for the purpose of this proceeding that Jonathan Lehr is the father of my child."

Certainly, this Court can see that that statement is being made by a woman who could have very easily denied paternity of your deponent if that were the case. Instead, all she says is she will not admit it and has not admitted it in any court proceedings. This bolsters without question your deponent's statement, unrefuted by Lorraine, that she has conceded the fact that your deponent is Jessica's father everywhere and to everyone else except in a court proceeding.

Your deponent will deal but briefly with the affidavit of Allan Green and Jennifer Lohr. Your deponent knows Allan Green only from a brief dis-

cussion and only spoke with him in order to ascertain the whereabouts of Lorraine. He was listed in the Milton, New York, phone book when your deponent was searching for Lorraine, and your deponent called him in the hope of obtaining Lorraine's whereabouts. Your deponent categorically denies the statements made on the second page of Mr. Green's affidavit that your deponent had no interest in seeing Jessica. Mr. Green knows nothing of your deponent nor your deponent's relationship with Jessica and/or Lorraine, and his conclusions as to your deponent's motives and/or emotional state are totally without basis. Jennifer Lohr's affidavit is also misrepresentative. When Jennifer Lohr states that your deponent knew of Lorraine's whereabouts up until August 1977, she is not correct. Your deponent has already stated that for a period of four consecutive weeks during

the spring of 1977 Lorraine revealed her whereabouts and permitted your deponent to visit with Jessica. On a couple of those occasions, Lorraine only permitted your deponent to visit with Renee and not Jessica. This in part was due to Jessica's age, to wit, at that time approximately six months old, but your deponent never indicated to anyone that he was not interested in Jessica. Once again, as Mr. Green has done in his affidavit, Ms. Lohr attempts to act as a psychiatrist by her attempt to interpret your deponent's intentions and desires. When she says that to her knowledge your deponent never demonstrated a desire to visit with Jessica, she has only very limited knowledge. One glaring omission stares the Court in the face from both of these affidavits, to wit, a denial that your deponent is Jessica's father. Indeed, they both knew that your deponent is Jessica's

father and had been told so by Lorraine. Once again it would be interesting to see these two people at an investigatory hearing take the stand and deny such knowledge.

In conclusion and without reiterating the position of your deponent, which is set forth in his petition, it can clearly be seen that at the time the adoption proceedings were commenced, Lorraine withheld from the Court and from the investigatory agencies information which should have been disclosed, information which the Legislature of this state has directed this Court to investigate. Indeed your deponent does not profess to know everything which will constitute the best interest of Jessica; however, your deponent has a great deal of in-put into the prior history of Lorraine, of your deponent, and of the child Jessica. Your deponent feels that

as the father of Jessica he should not only be afforded the opportunity to participate in determining what the best interests of the child Jessica are, but also having the same rights as Lorraine, the natural mother of the child in determining whether or not an adoption should take place. Your deponent objects strongly to being deprived of his parental rights without the opportunity of being heard. Indeed, it violates the basic foundation of our Constitution and should not be allowed to occur.

In conclusion, your deponent respectfully requests that this Court initially grant the motion to inspect the adoption records and that upon such inspection the order of adoption be vacated on the grounds herein set forth in this application, together with such other grounds as may be apparent from such inspection.

WHEREFORE, your deponent respectfully requests that the Court make an order granting in all respects all of the relief requested in your petitioner's application, together with such other and further relief as to the Court may seem proper.

S/_____
Jonathan Lehr

Sworn to before me this
7th day of August, 1979.

S/

David Jay Freeman
Notary Public, State of New York
No. 60 6396085
Qualified in Westchester County
Commission Expires March 30, 1980.

EXHIBIT A TO REPLY AFFIDAVITS - ORDER OF FAMILY COURT, WESTCHESTER COUNTY DATED JUNE 20, 1979

Short Form Order

FAMILY COURT OF THE STATE
OF NEW YORK
WESTCHESTER COUNTY
Present:
Hon. VINCENT GURAHIAN
Judge

----------x

IN THE MATTER OF JONATHAN LEHR,
Petitioner,
-against-
LORRAINE ROBERTSON,
Respondent.

Docket No. P-71, 1979

Motion Date May 1, 1979

----------x

The following papers numbered 1 to 14 read on this motion to dismiss

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits	1 - 2
	6,7
Answering Affidavits	11,12
Replying Affidavits	
Affidavits	
Filed Papers Memoranda	13,14
Pleadings-Exhibits-Stipulations-Minutes	3-5, 8-10

Upon the foregoing papers it is ordered that this motion is granted and the petition is dismissed without prejudice.

The right of a putative father to

proceed pursuant to Family Court Act §522 should necessarily be influenced by the status of the subject child. Said right therefore must be deemed severed so long as an order of adoption exists.

Further, even assuming petitioner's continued standing to pursue the threshold issue of paternity and obtain a declaratory adjudication as the natural father, there remain the inextricable matters of his rights to visitation et al. In view of the order of adoption such rights certainly could not be granted. To that extent the instant proceeding would become an exercise in futility over which this court will not entertain jurisdiction.

Streifer, Barnovitz & Samoff, P.C.
9 Main Street
Kingston, New York
12401

David J. Freeman, Esq.
175 Main Street
White Plains,
N.Y. 10601

Dated June 20, 1979 Entered June 20, 1979

/s/ Vincent Gurahian
J.F.C.

Briefs: Plaintiffs - Defendants - Petitioners - Respondents

EXHIBIT B TO REPLY AFFIDAVITS - EXCERPT
FROM GOVERNOR'S MESSAGE
GOVERNOR'S MEMORANDA
APPROVAL OF BILLS

This legislation is a major element of that commitment. These computer systems will help control and reduce expenses by reducing errors in eligibility and payments, and controlling the use of services and assistance. It is estimated that savings of over $60 million will be realized by both the State and localities when the systems are fully operational.

The Welfare Management System will provide a centralized system to collect basic information about all welfare recipients to guard against ineligibility, duplicate payments, mismanagement and fraud. It will also aid the local districts in processing applications and making eligibility determinations.

The Medicaid Management Information Systems will permit the State, rather than each local social services district, to pay Medicaid claims. The system will centralize information about eligible clients, providers of health care, the utilization of services, thereby improving our ability to detect overpayments, double billings, fraud and administrative errors.

The bills are approved.

Hugh L. Carey

THE RIGHTS OF FATHERS OF OUT-OF-WEDLOCK CHILDREN

On approving L. 1976, c. 665, the Governor stated:

July 24, 1976

In Stanley v. Illinois, 92 S. Ct. 1208, 405 U.S. 645 (1972), 31 L.Ed.2d 551, the Supreme Court held that the

father of an out-of-wedlock child had a substantial and cognizable interest in the custody of his child. The court required that such a father be provided with notice and an opportunity to be heard prior to a decision terminating his parental rights. In Matter of Malpica-Orsini (36 N.Y.2d 568, appeal dismissed 96 S.Ct. 765) the New York State Court of Appeals held that the consent of a father of an out-of-wedlock child is not required prior to placing the child for adoption unless such father has custody of the child at the time of the petition for adoption.

In the aftermath of these decisions, there has been substantial confusion as to the obligation of courts and adoption agencies towards putative fathers. While some agencies have construed the court decisions to require extensive searches for unidentified and unknown putative fathers resulting in protracted delays in making children eligible for adoption, others have failed to provide notice and an opportunity to be heard to adjudicated or other readily identifiable fathers of out-of-wedlock children in proceedings affecting the child's custody, guardianship or adoption.

This bill, developed by the Temporary State Commission on Child Welfare attempts to set forth guidelines for notifying fathers of out-of-wedlock children of proceedings affecting their parental interests. The bill specifies categories of fathers of out-of-wedlock children to whom the notice requirements enacted apply. It requires the Department of Social Services to establish a putative father registry to record the names and addresses of persons adjudi-

cated by courts of this State to be the father of an out-of-wedlock child; persons who filed with the registry before or after the birth of an out-of-wedlock child a notice of intent to claim paternity of the child; and persons adjudicated by the court of another state to be the father of an out-of-wedlock child where a certified copy of the court order has been filed with the registry by such person or by any other person.

The bill requires notice of proceedings affecting the future of the child to be given to putative fathers to enable such persons to present evidence to the court relevant to the best interests of the child.

The notice required to be given must be served by registered or certified mail to the person's last known address at least ten days prior to the proceeding. Notice by publication is not required, nor does the bill require any attempts at personal service. Failure to appear constitutes denial of an interest in the child which may result, without further notice, in the termination of parental rights.

While, on balance, the bill largely accomplishes its aims of achieving finality as early as possible in a child's life in the establishment of the rights, interests and obligations of all parties, its failure to provide more adequate provisions for notifying putative fathers of proceedings affecting the child is troubling. The notice provision, for example, is less demanding than that required in an ordinary civil suit. The time to respond is a relatively brief ten days.

The sponsors of this bill recognize that its notice provision could

be improved and have agreed to make amendments extending the time for putative father to respond. Since the bill does not take effect until the first day of January, I am confident that remedial legislation can be enacted early in the next legislative session to address these problems.

Approval of the bill is recommended by the Temporary State Commission on Child Welfare, the Department of Social Services, the Mayor of the City of New York, the Family Court Judges Association, the Legal Aid Society and the Federation of Protestant Welfare Agencies.

The bill is approved.

Hugh L. Carey

AGRICULTURAL DISTRICT CREATION PROPOSAL--NOTICE OF PUBLIC MEETINGS

On approving L.1976, cs. 671 and 672, the Governor stated:

July 24, 1976

The Agriculture and Markets Law provides that owners of land may submit a proposal to the county legislative body for the creation of an agricultural district within such county, provided such owners own at least 500 acres or 10 percent of the land proposed to be included in the district, whichever is greater. The county legislature must hold an initial public hearing after the filing[1] such an owner's proposal. The county legislature or the Commissioner of Environmental Conservation may modify the proposed district by inclusion or exclusion of lands. If the proposed district has been modified by either the county

legislature or the Commissioner of Environmental Conservation, the county legislature is required to hold a second public hearing on the modified district. If there has been no such modification, a second hearing may be held as a matter of discretion.

The present law requires that written notice of the initial hearing be sent to "persons owning land" within the district or modified district. Assembly 12899 changes that language to "owners of real property" within the proposed district or any proposed modifications "who are listed on the most recent assessment roll."

The bill does utilize more precise legal terminology to identify persons who are to receive statutory notice. The assessment roll, which is annually updated, is an appropriate source for determining property

SUR-REPLY AFFIRMATION OF JAY SAMOFF, ESQ.
DATED AUGUST 14, 1979

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY
----------X

In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

of

JESSICA MARTZ,

Adoptive Child.
----------X

SUR-REPLY AFFIRMATION

JAY L. SAMOFF makes the following affirmation under penalty of perjury:

I am the attorney for Lorraine Robertson and her husband, Richard N. Robertson, Jr., and am familiar with the facts set forth herein.

I have read the reply affirmation of David J. Freeman, Esq. dated August 7, 1979 and the reply affidavit of Jonathan Lehr verified August 7, 1979, and make this response thereto.

The movant's papers spend more time casting aspersions upon the conduct of the opposing parties and counsel than they do on addressing the true facts and issues. Accordingly, this affirmation is necessary to set the record straight.

I. THIS COURT WAS IMMEDIATELY NOTIFIED OF THE PENDENCY OF THE PATERNITY PROCEEDINGS.

As attorney for Mr. and Mrs. Robertson I repeat under penalty of perjury that I had no knowledge that Mr. Lehr had commenced a paternity proceeding in Westchester County concerning the infant, Jessica, until the summons and petition were served by mail on or about February 22 or 23, 1979. I thereafter immediately notified the Ulster County Family Court thereof as more fully set forth in my affirmation of July 6, 1979.

II. THIS APPLICATION IS NOT TIMELY.

Mr. Lehr's attorney notes that I

did not write any letter to him asking him to proceed immediately with this motion. He fails to note, however, that as early as April 5, 1979, in my motion papers submitted in connection with my motion to dismiss the Westchester County paternity proceeding I wrote as follows:

> "POINT V. PETITIONER'S ONLY AVENUE FOR REDRESS IS IN THE ADOPTION PROCEEDING IN ULSTER COUNTY FAMILY COURT.
>
> "As appears from the foregoing the only forum for petitioner's application is within the adoption proceeding."

And again on April 25, 1979 my reply affirmation stated as follows:

> "F. PETITIONER MUST RETURN TO THE ULSTER COUNTY FAMILY COURT FOR REDRESS.
>
> "As noted above, if petitioner feels he has been wronged by not having been made a party to the adoption proceeding, then his proper course is to seek leave of the Ulster County Family Court to allow him to participate therein. He cannot collaterally attack the adoption in this proceeding.
>
> "If,as petitioner repeatedly

> asserts, all he wants is to be heard on the best interests of the child, he may make such arguments to the Ulster County Family Court in his application to set aside the order of adoption.
>
> "It is pointed out that it has been over seven weeks since petitioner learned of the existence of the order of adoption and still has failed to move to set aside such order."

Further yet, in my memorandum of law submitted to the Westchester County Family Court I noted as follows:

> "As noted above, petitioner had failed and continues to fail to return to the Ulster County Family Court to make appropriate application."

All of the foregoing was in addition to my telephone conversation with Mr. Freeman of April 24, 1979 in which I requested that if he was going to move to set aside the order of adoption he should do so forthwith so that this matter will not linger on. He refused.

It took Mr. Lehr nearly four months to make this application, during

which time the Robertson family has suffered the emotional stresses and strains attendant with the uncertainty of their daughter's future. Such an unconscionable delay should not be countenanced.

III. LORRAINE ROBERTSON HAS NO DUTY TO NAME THE FATHER OF JESSICA.

The movant's assertions to the contrary notwithstanding, the failure to make specific denials to specific charges does not constitute an admission of paternity by Lorraine Robertson. The motion papers are not pleadings, and the failure to deny each and every allegation may not be considered an admission.

In fact, Lorraine Robertson has not conceded herein that Jonathan Lehr is the father of Jessica. Further, she cannot be compelled to make any such concession. In any proceeding for the determination of paternity the respondent, male or female, has a statutory right not

to testify. Family Court Act §531. Accordingly, Lorraine Robertson's failure to deny movant's claims of paternity may not be construed as an admission thereof. Paternity is an issue that only a trial can determine, and Mr. Lehr's assertions are not binding.

IV. LORRAINE ROBERTSON COMMITTED NO FRAUD IN INTRODUCING A BIRTH CERTIFICATE SHOWING NO NAME FOR THE CHILD'S FATHER.

The movant claims that Lorraine Robertson committed a fraud by not listing Jonathan Lehr as the child's father on the birth certificate.

Firstly, it should be noted that Lorraine Robertson never had any conversation with anyone in which she represented that Jonathan Lehr's name was on the child's birth certificate. Her annexed affidavit makes it clear that the subject never arose.

Secondly, even if she had wanted

to name a father on the birth certificate, she could not do so.

Public Health Law §4135, subdivision 2 specifically states as follows:

> "The name of the putative father of a child born out of wedlock shall not be entered on the certificate of birth prior to filing without the consent in writing of both the mother and putative father, duly verified, and filed with the record of birth***."

Accordingly, it was impossible for Lorraine Robertson to name Jonathan Lehr as the father on the birth certificate without his knowledge and express sworn, written consent.

V. THE ORDER OF ADOPTION MAY NOT BE SET ASIDE BY THIS COURT ON THE GROUNDS OF ABUSE OF DISCRETION.

CPLR 5015 set forth with specificity the limited grounds under which a court may set aside its own order or judgment. Abuse of discretion is not among them. Movant's counsel argues that Domestic Relations Law §114 gives the

Family Court the power to set aside its own order of adoption for any reason. This is not the case.

DRL §114 states as follows:

> "In like manner as a court of general jurisdiction exercises such powers, a judge or surrogate of a court in which the order of adoption was made may open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause." (Underscoring supplied)

It is evident that the legislature intended the Family Court to have the same power to set aside an order of adoption as enjoyed by the Supreme Court, no more, no less. It specifically listed fraud and newly discovered evidence as two of the grounds referred to in CPLR 5015. It is clear that the expression "or other sufficient cause" merely refers to the other grounds listed in CPLR 5015: excusable default, lack of jurisdiction, reversal, modification or vacatur of a prior judgment, etc. Abuse of discretion

is not listed as sufficient grounds.

The rationale behind CPLR 5015 is clear. There must be a finality to an order or judgment, particularly orders of adoption. No court should sit in appellate review of its own acts of discretion. Abuse of discretion is reviewable only by an appellate court. If the trial court could review its own discretionary acts at any time, then there would be nothing to prevent a second, third or fourth application on the same question every time the court had a change of heart. For this reason, the court is bound by its own order unless it can be shown that there was an excusable default, fraud, newly discovered evidence, lack of jurisdiction, or a reversal of a prior order.

In light of the foregoing, this court does not have the statutory authority to set aside the order of adoption

based upon its own alleged abuse of discretion.

As noted in In re K.W.V., 92 Misc. 2d 292, 399 N.Y.S.2d 593 (Sur. Ct. N.Y. Co. 1977):

> "Adoption, following termination of natural parental status, is final and not subject to abrogation except for defects such as fraud or newly discovered evidence."

VI. MATTER OF LORD IS INAPPOSITE.

The movant cites Matter of the Adoption of Deborah E. Lord, an Infant, 28 App. Div. 1203, 288 N.Y.S.2d 25, (4th Dept. 1967) as standing for the proposition that the court has the authority to permit Jonathan Lehr to participate in the adoption proceedings. Lord, however, is inapposite.

Firstly, it is pointed out that pursuant to DRL §111 subdivision 1(d) any person having lawful custody of the adoptive child is a necessary party to the

adoption proceeding. In Lord, however, there apparently was a considerable factual dispute as to custody of the child. Accordingly, if the appellant there was correct on the issue of who had lawful custody, then he would have been statutorily entitled to be put on notice of the adoption proceedings. In the present case, assuming, arguendo, the truth or all of Mr. Lehr's factual assertions, then he still is not entitled to notice pursuant to DRL §111-a.

Secondly, Lord was decided in 1967, some nine years before the enactment of DRL §111-a in 1976. DRL §111-a was enacted in direct response to Stanley v. Illinois, 405 U.S. 645 in order to leave no doubt as to who was and who was not entitled to notice in the case of the adoption of a child born out of wedlock. DRL §111-a gives a specific, exclusive list of putative fathers who

are entitled to notice of an adoption proceeding, and it gives the court no discretion whatever to vary therefrom.

VII. DRL §111-a IS BINDING UPON THE COURT.

As noted in the answering papers previously submitted, DRL §111-a specifically defines the only categories of putative fathers entitled to notice of an adoption proceeding. Movant argues, however, that such section is unconstitutional, and he relies on Caban v. Mohammed, ___U.S.___, and Stanley v. Illinois, 405 U.S. 645 as authority therefor.

There is no question that Caban determined that it is unconstitutional to arbitrarily give a natural mother the right to withhold her consent to an adoption while withholding a similar right from a natural father of a child born out of wedlock. As noted in previously submitted papers, however, Caban is not re-

troactive. To give retroactive effect to Caban would be to set aside virtually every adoption in the history of the State of New York involving a child born out of wedlock. Clearly this would be a disasterous conclusion and one which certainly would be against public policy.

In any event, however, we need not reach this issue here. Caban merely determines the scopy of a natural father's participation once he is a party to the adoption proceeding. Here we are faced with a threshhold question of whether or not this putative father is entitled to participate in the proceeding in the first place.

The movant argues that Stanley v. Illinois, supra, makes DRL §111-a unconstitutional in that it limits the categories of putative fathers who are entitled to notice, but places no such limitation upon mothers of children born out of wed-

lock.

Not all gender based distinctions, however, are unconstitutional. It is only where such distinctions are arbitrary and capricious that they may be found unconstitutional. Here the distinction is neither arbitrary nor capricious, but serves a valid rational and legitimate purpose.

When a child comes out of its mother's womb there can be no dispute as to maternity. It is an easily determinable fact. How that child got into the womb, however, is not so easily determined and often is the subject of great dispute. Accordingly, DRL §111-a does not attempt to determine who the natural father is, but instead merely sets forth the requirements that must be met by any person who wishes to claim paternity.

Again, movant's assertions to the contrary notwithstanding, there is no

putative father who cannot guarantee himself notice of an adoption proceeding by merely putting his name upon the putative father registry. Since the registry is open to all (technically, even a woman can place her name on the putative father registry) there is no classification of putative father who cannot be heard if he so chooses.

Finally, it is noted that DRL §111-a does not give the court any discretion at all to permit other persons to be put on notice. Since adoption is an abrogation of common law and is entirely a creature of statute, the court is obliged to follow its prescriptions without variation therefrom.

For the court to vacate its own order of adoption in the name of discretion would be to condemn the infant Jessica to a life of bastardy. Such a result surely cannot be in her best inter-

ests and is not the fair and reasonable object of an exercise of discretion.

Dated: August 14, 1979.

S/ Jay L. Samoff

SUR-REPLY AFFIDAVIT OF LORRAINE ROBERTSON SWORN TO AUGUST 14, 1979

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY
----------X

In the Matter of the Adoption by

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

of

JESSICA MARTZ,

Adoptive Child.

----------X

SUR-REPLY AFFIDAVIT

STATE OF NEW YORK :
: ss.:
COUNTY OF ULSTER :

LORRAINE ROBERTSON, being duly sworn, deposes and says:

I have read the reply papers of David J. Freeman, Esq. and Jonathan Lehr, and make the following response thereto.

My failure to respond to Mr. Lehr's shotgun attack of so-called "facts" should not be viewed as an admis-

sion that he is Jessica's father. Paternity is an issue that can only be determined by a court after trial.

Mr. Lehr's litany of "facts" are entirely irrelevant and are not worthy of response. For example, he refers to the fact that Jessica calls Helen Lehr "grandma," but neglects to tell the court that both of my older children call her "grandma." This is quite natural since Helen Lehr was my lawful guardian and acted as my "mother."

Further, neither by word or deed did I ever represent to anyone that Jonathan Lehr's name was on Jessica's birth certificate. The subject never arose. In fact, I could not possibly put Mr. Lehr's name on the birth certificate without his own written, sworn consent.

Additionally, I have never heard of any trust fund being set up for Jessica by Mr. Lehr. Several years ago

Helen Lehr informed me that she had set up a trust fund or account for both of my children, Jessica and Renee. At no time did anyone ever inform me of a similar fund established by Jonathan, if such fund actually exists.

In any event, ever since Jessica's birth Mr. Lehr has not contributed a single cent to her support.

I could go on and on pointing out the half-truths and inconsistencies in Mr. Lehr's statements, but this would be entirely irrelevant and only serve to obscure the only true issue: Did Mr. Lehr comply with DRL §111-a or did ne not? There is no question that he did not,

and thus the adoption should be final.

S/ Lorraine Robertson

Sworn to before me this

14th day of August, 1979.

S/_____
Notary Public

Jay Samoff
Notary Public, State of New York

Qualified in Nassau County
Cert. Filed in Ulster County
Commission Expires March 30, 1980.

ORDER APPEALED FROM, DATED NOVEMBER 30, 1979

At a term of the Family Court of the State of New York held in and for the County of Ulster at the Ulster County Office Building Kingston, New York on August 9, 1979.

P R E S E N T:

HON. HUGH R. ELWYN, JUDGE.

----------X

In the Matter of the Adoption by
LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR., ORDER

Docket
of #A-47-78
JESSICA MARTZ,

Adoptive Child.

----------X

Petitioner, Jonathan Lehr, having applied to this court for an order opening, vacating and/or setting aside the order of adoption herein, and for a further order permitting the inspection of the sealed records, order, and any index thereof in the proceedings herein; and

Upon reading and filing the or-

der to show cause for the relief aforesaid dated June 22, 1979, the petition of Jonathan Lehr verified June 13, 1979, the affidavit of Helen Lehr verified June 11, 1979, the reply affirmation of David J. Freeman, Esq., dated August 7, 1979, and the reply affidavit of Jonathan Lehr verified August 7, 1979, and the exhibits annexed to all of the foregoing, submitted in support of the application, and the affirmation of Jay L. Samoff, Esq. dated July 6, 1979, the affidavit of Lorraine Robertson verified July 6, 1979, the affidavit of Allan Green verified July 5, 1979, the affidavit of Jennifer Lohr verified July 5, 1979, the sur-reply affirmation of Jay L. Samoff, Esq. dated August 14, 1979, and the sur-reply affidavit of Lorraine Robertson verified August 14, 1979, and the exhibits annexed to all of the foregoing, submitted in opposition to the application; and the mat-

ter having duly come on to be heard, and the petitioner, Jonathan Lehr, having appeared by his attorney, David J. Freeman, Esq., and the respondents, Lorraine Robertson and Richard N. Robertson, Jr., having appeared by their attorneys, Streifer, Barnovitz & Samoff, P.C., Jay L. Samoff, Esq., of counsel, and oral argument having been had thereon, and the Attorney General of the State of New York by Robert J. Schack, Esq., Assistant Attorney General, not having appeared in person, but having submitted a brief in writing, and due deliberation having been had thereon, and the court having rendered a decision in writing dated November 26, 1979;

NOW, upon motion of Streifer, Barnovitz & Samoff, P.C., attorneys for the respondents, Lorraine Robertson and Richard N. Robertson, Jr., it is

ORDERED, that petitioner Jona-

than Lehr's application be and hereby is denied in all respects.

Dated: November 30, 1979

at Kingston, New York

E N T E R

s/Hugh R. Elwin

Family Court Judge

NOTICE OF APPEAL BY APPELLANT

STATE OF NEW YORK
FAMILY COURT: ULSTER COUNTY
----------X

In the Matter of the Adoption
by Lorraine and Richard Robertson

of JESSICA MARTZ

----------X
NOTICE OF APPEAL
DOCKET NO.A47 78

S I R S:

PLEASE TAKE NOTICE that the petitioner, Jonathan Lehr, hereby appeals to the New York Supreme Court, Appellate Division, Third Department, from an order of the Hon. Hugh R. Elwyn entered in this proceeding in the office of the Clerk of the County of Ulster, on the 30th day of November, 1979, which order denied in all respects the petition of Jonathan Lehr, the petitioner, for an order: (1) opening, vacating, and/or setting aside an order of adoption in the above entitled proceeding entered in the Ulster County Clerk's

Office on March 7, 1979; and (2) permitting the inspection of the sealed records, order, and any index thereof in the proceeding for the adoption of Jessica, an infant; and the petitioner appeals from each and every part of the order.

Dated: White Plains, N.Y.
December 13, 1979.

s/David J. Freeman
David J. Freeman, Esq.
Attorney for Jonathan Lehr
175 Main Street
White Plains, N.Y. 10601

TO: Clerk of Family Court
Ulster County
County Office Bldg., Fair Street
Kingston, N.Y. 12401

William Kelly, Esq.
County Attorney
County Office Bldg., Fair Street
Kingston, N.Y. 12401

Streifer, Barnovitz & Samoff, P.C.
Attorneys for Robertson
9 Main Street, Kingston, N.Y.12401

Robert J. Schack, Asst. Attorney Gen.
State of New York
Department of Law
Two World Trade Center
New York, N.Y. 10047

ORDER OF APPELLATE DIVISION, THIRD DEPARTMENT APPEALED FROM, DATED DECEMBER 17, 1980

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 6th day of October, 1980.

PRESENT:

HON. LOUIS M. GREENBLOTT,

Justice Presiding,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. ANN. T. MIKOLL,
Associate Justices.

----------X

In the Matter of the Adoption of

JESSICA MARTZ,

JONATHAN LEHR,

Appellant,

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

Respondents,

ROBERT ABRAMS, as Attorney

General,

Intervenor-Respondent-Appellant.

----------X

ULSTER COUNTY
FAMILY COURT
DOCKET NO. A-47-78

Appellant, Jonathan Lehr, having appealed from an order of the Family Court of Ulster County, entered on the 30th day of November, 1979, in the office of the clerk of the Ulster County Family Court, and Intervenor-Respondent-Appellant Robert Abrams, as Attorney General, having appealed in part from the decision of the Ulster County Family Court dated November 26, 1979, and said appeals having been presented during the above-stated term of this Court, and having been argued by David J. Freeman, Esq. of counsel for appellant, and by Streifer, Barnovitz & Samoff, P.C., Jay L. Samoff, Esq., of counsel for respon-

dents, and by Hon. Robert Abrams, Robert J. Schack, Esq., of counsel for intervenor-respondent-appellant, and, after due deliberation, the Court having rendered a decision on the 11th day of December, 1980, Justice Ann T. Mikoll dissenting, it is hereby

ORDERED that the order of the Family Court of Ulster County entered on the 30th day of November, 1979 be and hereby is affirmed, with costs.

ENTER:

S/ John J. O'Brien
CLERK

DATED AND ENTERED: December 17, 1980.

A TRUE COPY:

S/ John J. O'Brien
Clerk

NOTICE OF APPEAL BY APPELLANT

STATE OF NEW YORK
FAMILY COURT : ULSTER COUNTY
----------X

In the Matter of the
Adoption of Jessica Martz,

JONATHAN LEHR,

Appellant,

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

Respondents,

ROBERT ABRAMS, as Attorney
General,

Intervenor-Respondent-Appellant.

----------X

NOTICE OF APPEAL

DOCKET #A 47 78

S I R S :

PLEASE TAKE NOTICE that the Apellant appeals to the Court of Appeals of the State of New York from an order of the Appellate Division, Third Department, entered in the Office of the Clerk of the Appellate Division on December 17,

1980, and which order affirmed the order of the Family Court, Ulster County, in favor of the Respondents, entered in the Office of the Clerk of the County of Ulster on November 30, 1980, which said order, (i) denied Appellant's application to vacate and/or set aside an order of adoption made by the Family Court of Ulster County on March 7, 1979 and entered in the Ulster County Clerk's Office on March 7, 1979, and (ii) further denied Appellant's application to inspect the sealed records with respect to said adoption.

Justice of the Appellant Division, Ann T. Mikoll, Third Department, dissented on questions of law in favor of the Appellant from the aforesaid order of affirmance and would vote to reverse the order of the Family Court, Ulster County, on the law.

PLEASE TAKE FURTHER NOTICE that

the Appellant appeals from each and every part of the order of the Appellate Division and from the whole thereof.

Dated: White Plains, New York
December 29, 1980.

Yours etc.

David J. Freeman, Esq.
Attorney for Appellant
175 Main Street
White Plains, N.Y.10601
914 949 3311

TO: Clerk of the County of Ulster
County Office Building
Fair Street
Kingston, N.Y. 12401

Streifer, Barnovitz & Samoff, P.C.
9 Main Street
Kingston, N.Y. 12401
Attorneys for Respondents

Hon. Robert Abrams, Attorney General
Att. Robert J. Schack, Asst. Attorney General
Two World Trade Center
New York, N.Y. 10047
Intervenor-Respondent-Appellant

SUPREME COURT OF THE UNITED STATES

No. 81-1756

Jonathan Lehr,

Appellant,

v.

Lorraine Robertson, et al.

APPEAL from the Court of Appeals of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case further consideration of the question of jurisdication is postponed to the hearing of the case on the merits.

May 17, 1982

APPENDIX F--STATE STATUTES INVOLVED AS AMENDED LAWS 1980; CHAPTER 575 EFFECTIVE JULY 27, 1980.

DOMESTIC RELATIONS LAW

Section 111. Whose consent required as amended by Chapter 575, L. 1980.*

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

*Matter underscored is new; matter in brackets is old law to be omitted. The Statute without underscored or bracketted changes is the law as it stood on March 7, 1979. The statute with the changes is the present law.

(d) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or

authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained

substantial and continuous contact with the child for the purpose of this subdivision.

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

(f) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having

custody of the child:

(a) who evinces an intent to forego his or her pa-ental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of seciton three hundred eighty-four of the social services law, or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental

retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law; or

(f) who has executed an instrument, which shall be irrevocable, denying the paternity of the child or consenting to the other parent's surrender of the child or consent to the child's adoption, such instrument having been executed after conception and acknowledged or proved in the manner required to permit the recording of a deed.

3. Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c)* of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct

* Sic. Should be (b), (c), (d) and (e).

that the consent specified in paragraph (d)** of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consents cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to

** Sic. Should be (f).

the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

Motion to Dismiss or Affirm

CORRECTED COPY

No. A-704 81-1756

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

IN THE MATTER OF THE ADOPTION

OF

JESSICA MARTZ.

JONATHAN LEHR,

Appellant,

v.

LORRAINE ROBERTSON and RICHARD N. ROBERTSON, JR.,

Appellees,

ROBERT ABRAMS, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK (CASE NO. 565)

MOTION TO DISMISS OR AFFIRM

JAY L. SAMOFF
STREIFER, BARNOVITZ & SAMOFF
Attorneys for Appellees
Lorraine Robertson and Richard N. Robertson, Jr.
9 Main Street
U.P.O. Box 3515
Kingston, NY 12401
(914) 331-4977

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

IN THE MATTER

OF

The Adoption of JESSICA MARTZ.

JONATHAN LEHR,

Appellant,

v.

LORRAINE ROBERTSON and RICHARD N. ROBERTSON, Jr.,

Appellees,

ROBERT ABRAMS, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK (Case No. 565).

MOTION TO DISMISS OR AFFIRM.

Motion is hereby made to dismiss this appeal pursuant to Rules 16.1(a) and (b), and, in the alternative, to affirm the decision and judgment of the Court of Appeals of the State of New York pursuant to Rule 16.1(c).

Background.

The following presents a factual framework and chronological sequence of events leading up to this appeal.

On November 9, 1976, in White Plains, New York, the infant Jessica was born out-of-wedlock to appellee, Lorraine Robertson, then known as Lorraine Martz.

The infant's birth certificate does not list the name of any person as being the father. This omission is required by New York Law (Public Health Law §4135) unless the sworn, written consent of both mother and putative father is first obtained.

On August 28, 1977, Lorraine Martz married appellee Richard N. Robertson, Jr.

On December 21, 1978, Richard N. Robertson, Jr., filed in the Ulster County Family Court a petition to adopt Jessica, and was joined in such application by his wife, Lorraine.

At the time of filing the adoption proceding, Sections 111 and 111-a of the Domestic Relations Law of the State of New York governed who was entitled to notice of the proceeding. These statutes, in the form as they then existed, are reproduced in the appendix immediately following this motion. It should be noted that the statutes reproduced by appellant in his Appendix F are not those as they existed at the time of the adoption proceeding, but as

they were subsequently amended. The Court of Appeals determined that the amendments have no applicability to this case (see appellant's appendix, p. A7, footnote 4).

Appellees have never conceded and no court has ever determined that appellant is Jessica's father. Accordingly, appellant's status is merely that of a claimant to paternity.

Pursuant to DRL §111-a there are seven categories of putative fathers who were entitled to notice of an adoption proceeding concerning children born out-of-wedlock. One universal category mandated that notice be given to anyone and everyone who filed on a putative father registry maintained by the state. Appellant neglected to so register and did not fall within any of the six other categories. This was conceded by appellant and found by all courts below. Accordingly, no notice was given to appellant.

On January 15, 1979, the adoption hearing was held and completed and the Ulster County Family Court referred the matter to the Ulster County Department of Social Services for its report on the suitability of the adoptive parents and home.

Totally unbeknownst to the Ulster County Family Court and the appellees, on January 30, 1979, some two weeks after the adoption hearing, appellant filed a paternity proceeding in the Westchester County Family Court. Notice thereof was not served, however, until February 22, 1979, several weeks after the adoption hearing was conducted and when all that remained to be done was the final submission of the Social Services report and the ministerial act of signing the final order of adoption.

Counsel for appellees notified both the Ulster County and Westchester County Family Courts of the pendency of both proceedings.

On March 7, 1979, the Ulster County Family Court found that, despite appellant's belatedly filed paternity proceeding in another court, he was not entitled to participate in the adoption proceeding under DRL §§ 111 and 111-a. The final order of adoption was signed that day.

On April 24, 1979, this Court announced its decision in *Caban v. Mohammed,* 441 U.S. 380, 99 S. Ct. 1760, wherein DRL §111 was found to be unconstitutional to the extent that it arbitrarily discriminated between mothers and fathers of children born out-of-wedlock by requiring the consent to adoption of the former but not of the latter.

Appellant, who was a stranger to the adoption proceeding, on June 13, 1979, brought an independent post-termination proceeding in Ulster County Family Court to set aside the adoption based upon *Caban* principles claiming that the lack of notice to him of the adoption proceeding was a denial of due process and equal protection.

The Ulster County Family Court denied appellant's application, and that decision was affirmed by the Appellate Division of the New York State Supreme Court, Third Department, and the Court of Appeals of the State of New York. The Court of Appeals decision is reported at 54 N.Y. 2d 417 and is reproduced in appellant's appendix at pages A1 through A18.

In connection with the foregoing chronology two points need be raised.

Firstly, appellant urged below that it was an abuse of discretion for the Ulster County Family Court Judge to have signed the final order of adoption when he knew that appellant was claiming to be the father of the child. Notwithstanding such knowledge, however, it is undisputed that adoption is entirely a creature of statute requiring

strict adherence thereto, and the appellant still had no standing under the Domestic Relations Law to participate in the adoption proceeding. The Court of Appeals specifically found that appellant had ample opportunity to file a notice of intent to claim paternity (the putative father registry above mentioned) which would have assured him the right to participate, and that he failed to avail himself of that opportunity (see footnote 7 to the opinion of the Court of Appeals, appellant's appendix, p. A12).

All courts below found that there was no abuse of discretion, and this is a subject that should not be within the purview of this appeal. Certainly it forms no basis for appeal under 28 U.S.C. §1257(2).

Secondly, appellant argues that, at the time the *Caban* decision was announced, the adoption case had not been finally determined. Again, the Court is referred to a footnote in the Court of Appeals' decision in which this question is laid to rest (appellant's appendix, p. A6, footnote 3).

It is with the foregoing in mind that the issue of the lack of jurisdiction of this Court is approached.

The appeal is not within the Court's jurisdiction (Rule 16.1[a]) and the constitutionality of DRL §§ 111 and 111-a was not expressly passed on (Rule 16.1[b]).

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2) by asserting that the validity of a state statute has been challenged as unconstitutional and the decision is in favor of its validity. Such is not the case.

Relying heavily upon *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, appellant argued that Domestic Relations Law §111 denied him equal protection and due process rights by failing to provide that his consent was required before Jessica could be adopted. He further argued that those rights were violated by DRL §111-a which did not provide that he be given formal notice of the adoption proceeding.

The Court of Appeals did not decide in favor of the validity of those statutes. Rather, it took great pains to specifically point out that it would not consider such constitutional challenge.

It should be emphasized that this is not an appeal from the adoption proceeding, but rather an appeal from a separate, independent, post-termination attack upon the finalized adoption. Since this independent proceeding was commenced after the announcement of the *Caban* decision, the Court of Appeals had to determine whether or not to apply *Caban* retroactively. It stated as follows:

> We have no occasion to reach or resolve the substantive aspects of petitioner's contentions. The decision in *Caban* was announced on April 24, 1979, nearly seven weeks after the final order of adoption in this case. The adoption proceeding was completed with the entry of that order. The present application, as previously noted, is a posttermination attack on the final determination in the adoption proceeding by one who was not a party to that proceeding.[3] We conclude that, unless the Supreme Court itself accords full retroactive effect to its holding, the decision and the rationale of *Caban* should be applied only to actions and proceedings that were still in the judicial process at the time the decision was announced or that have since been

> commenced, and not to actions and proceedings which had been finally determined and whose judicial life had then expired (cf. *People v. Torres*, 53 NY2d 213; see *Gager v. White*, 53 NY2d 475, 482). To accord full retroactive effect to *Caban* and to the extension of its rationale to the notice requirements of our adoption statute (and thus to allow its doctrine to be invoked on applications attacking adoption proceedings long since finally concluded) would be, as the dissenters in *Caban* implied (441 US 380, 401, 415-416, *supra*), to work cruel havoc. Accordingly, we hold that sections 111 and 111-a of the Domestic Relations Law as invoked in the adoption proceeding here are immune from constitutional assault predicated on *Caban* and its rationale in the present postfinal determination proceeding (cf. *Chevron Oil Co. v. Huson*, 404 US 97, 106-107) (appellant's appendix, p. A6).

Appellant would argue that, the *Caban* decision aside, the Court of Appeals could have considered his assault upon the validity of the statutes based upon pre-*Caban* principles. Whether or not this is true is entirely irrelevant, however, since the court declined to do so.

Having refused to address the constitutional challenge on any terms but *Caban*, and having refused to consider *Caban* as a basis for a retroactive post-termination attack upon a finalized adoption, the Court of Appeals thus made no decision with regard to the validity of the statutes.

Absent a finding below of the validity of the statutes, this Court has no jurisdiction of the appeal under 28 U.S.C. §1257(2) and the appeal should be dismissed pursuant to Rule 16.1(a). Further, absent an express ruling on the validity of the statutes, the appeal should be dismissed pursuant to Rule 16.1(b).

In the alternative, the question on which the decision of the cause depends is so unsubstantial as not to need further argument (Rule 16.1[c]).

As noted above, the Court has no jurisdiction over this appeal. If the court should determine that it has jurisdiction, then the decision below should be affirmed pursuant to Rule 16.1(c).

It is manifest that the only decision made by the Court of Appeals is that *Caban* should not be given retroactive effect. This is a question that this Court can determine in one sentence, and without the necessity of hearing further argument.

On the question of retroactivity both the majority and minority of the New York Court of Appeals are of one voice. As stated by Chief Judge Cooke, "(t)here is no quarrel here with the majority's conclusion that *Caban v. Mohammed,* 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297, which concerned a putative father's right to consent to adoption, should not be given retroactive effect to an adoption proceeding concluded prior to that decision."

The point need not here be belabored that to give retroactive effect to *Caban* so as to make it applicable to completed adoptions could potentially lead to an attack upon thousands upon thousands of adoption decrees entered without the consent of the natural father. Such a Pandora's box should not be opened.

For the foregoing reasons the appeal should be dismissed, or, in the alternative, the decision below should be affirmed.

Respectfully submitted,

JAY L. SAMOFF
STREIFER, BARNOVITZ & SAMOFF
Attorneys for Appellees Robertson
9 Main Street—U.P.O Box 3515
Kingston, NY 12401
(914) 331-4977

Appendix A.

DOMESTIC RELATIONS LAW § 111

§ 111. Whose consent required

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental illness or mental retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law.

3. Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c) of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in paragraph (d) of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

Appendix B.

§ 111-a. Notice in certain proceedings to fathers of children born out-of-wedlock

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any other law, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who has previously received notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child or the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother subsequent to the birth of the child.

3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

4. Notice under this section shall be given at least ten days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity pursuant to section three hundred seventy-two-c of the social services law, to the address last entered therein. Notice by publication shall not be required to be given to a person entitled to notice pursuant to the provisions of this section.

5. A person may waive his right to notice under this section by written instrument subscribed by him and acknowledged or proved in the manner required for the execution of a surrender instrument pursuant to section three hundred eighty-four of the social services law.

6. The notice given to persons pursuant to this section shall inform them of the time, date, place and purpose of the proceeding and shall also apprise such persons that their failure to appear shall constitute a denial of their interest in the child which denial may result, without further notice, in the adoption or other disposition of the custody of the child.

7. No order of adoption and no order of the court pursuant to section one hundred fifteen-b shall be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section but failed to appear, or who waived notice pursuant to subdivision five. Nor shall any order of adoption be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section in any previous proceeding pursuant to section one hundred fifteen-b in which the court determined that the best interests of the child would be served by adoption of the child by the adoptive parents.

Appellant's Brief

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ALEXANDER L. STEVAS,
CLERK

No. 81-1756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

In the matter of the Adoption of Jessica Martz, a Minor under the age of fourteen years, by

JONATHAN LEHR,

Appellant,

–v.–

LORRAINE ROBERTSON,
RICHARD N. ROBERTSON, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK (Case No. 565)

APPELLANT'S BRIEF

DAVID J. FREEMAN, ESQ
175 Main Street
White Plains, New York 10601
(914) 949-3311
Attorney for Appellant

APPEAL DOCKETED: March 22, 1982
JURISDICTION POSTPONED: MAY 17, 1982.

(12896B)

Questions Presented

1. Whether the New York Domestic Relations Law Sec.111 and Sec.111a, on their face and as applied to Appellant, an unwed father, violate his rights of due process guaranteed by the Fourteenth Amendment to the United States Constitution, by authorizing the adoption of his daughter to become final, thereby forever terminating his parental rights, without first requiring that Appellant be notified of such adoption proceedings and without first requiring that he be given the opportunity to be heard therein, when, prior to the final order of adoption, the court granting the adoption, as well as the unwed mother and adoptive father, had actual knowledge that Appellant had instituted a paternity proceeding, pursuant to state law, in which proceeding Appellant requested that he be adjudicated the natural father of his daughter, that he

be afforded visitation rights with his daughter and that he be permitted to pay for the support of his daughter.

II. Whether those same state statutes, on their face and as applied to Appellant, violate his right of equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution, by not requiring that notice of and the opportunity to be heard in such adoption proceedings be given to Appellant, while, on the other hand, requiring that notice of and the opportunity to be heard in such adoption proceedings shall be given to other parents, including unwed mothers, wed mothers and fathers, divorced fathers and mothers, and a limited category of unwed fathers, other than the Appellant herein.

III. Whether said same state statutes, on their face and as applied to Appellant, violate his rights of due process and

equal protection guaranteed by the Fourteenth ... Amendment to the United States Constitution, by permitting a final order of adoption to be made respecting said Appellant's daughter, without first requiring that Appellant be given the opportunity to be heard in the adoption proceedings to prove his fitness, to consent to the adoption and/or to offer evidence respecting his daughter's best interests, while on the other hand, affording some or all of those rights to other parents including unwed mothers, wed fathers and mothers, divorced fathers and mothers, and certain unwed fathers other than the Appellant herein.

IV. Can the Rule of Law annunciated by this Court in Caban v. Mohammed, 441 U.S. 380 (1979) be applied to the facts and circumstances of this case, either retrospectively or otherwise, and if so, does not that holding render the state statutes

as construed and applied to Appellant herein to have deprived him of his due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

PARTIES TO PROCEEDING

Appellant: Jonathan Lehr; Appellees: Lorraine Robertson, Richard N. Robertson; Intervenor Appellee: Robert Abrams, Attorney General of the State of New York.

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York, dated November 24, 1981, is reported at 54 N.Y.2d 417 (J.S. App. A). The opinion of the Supreme Court of the State of New York, Appellate Division, Third Department, dated December 11, 1980, is reported at 77 App.Div. 2d 381 (J.S. App. B). The opinion of the New York State Family Court, Ulster County, dated November 26, 1979, is reported at 102 Misc. 2d 102 (J.S. App. C).

JURISDICTION

The judgment of the Court of Appeals of the State of New York sought to be reviewed was entered on November 24, 1981. The Notice of Appeal was filed on February 8, 1982, in the Family Court, Ulster County, and the Office of the Clerk of the Court of Appeals. On February 10, 1982, Mr. Justice Marshall signed an

order extending time for filing this Jurisdictional Statement until March 22, 1982. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. 1257(2).

Constitutional Provisions, Statutes, and Regulations Involved.

Constitutional: The relevant Constitutional provision involved is the United States Constitution, Fourteenth Amendment, Section 1, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

State: The relevant State statutes are New York Domestic Relations Law, Section 111, (especially subdivision 3), and Section 111a (14 McKinney's Consolidated Laws

of New York Annotated, copyright 1977), as amended to date are set out verbatim in Jurisdictional Statement Appendix F.*

* Appellant inadvertently omitted subparagraph 111 f from the contents of Section 111 as set forth in the Jurisdictional Statement Appendix F. Said statute as corrected is attached to this brief as Appendix A. References made in this brief to that statute as contained in the Jurisdictional Statement Appendix F are not affected by said omission.

STATEMENT OF CASE

INTRODUCTION

On March 7, 1979, Judge Hugh R. Elwyn, of the New York Family Court, signed an order of adoption by which the infant, Jessica M, was adopted by her natural mother, Appellee Lorraine Robertson ("Lorraine"), and her husband, Appellee Richard N. Robertson, Jr. (A-66).* Jessica M had been born out-of-wedlock on November 9, 1976 (A-94).

The Appellant, Jonathan Lehr, claims to be the natural father of Jessica M. This claim has been formally acknowledged by Mr. Lehr by the filing of his paternity petition in the Westchester County Family Court (A-71), which petition was filed on January 30, 1979, and served upon Mr.

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* Reference is to Appellant's Joint Appendix.

and Mrs. Robertson on February 22, 1979, and of which petition the Family Court Judge had knowledge as of February 26, 1979 (J.S. App. C 3,4).

Mr. Lehr, in the courts below, had made an application to set aside and vacate the order of adoption and to inspect the sealed adoption records on the grounds that, despite being known and ascertainable by virtue of filing said paternity petition, he was not notified of the adoption proceedings nor was he given the opportunity to be heard therein* A basis of Mr. Lehr's application was that the New York statutes** relied upon by the courts below and as construed and applied to him by said courts had denied him due process

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* At that hearing Lehr claimed the right to be heard on his fitness, the best interests of Jessica M., and the right to consent or withhold his consent to the adoption.

** Sections 111 and 111a of the Domestic Relations Law of the State of New York (J.S. App. F).

of law and equal protection of the laws as required by the Fourteenth Amendment of the U.S. Constitution. It was in reliance upon these statutes that the lower courts deprived Mr. Lehr of notice and the opportunity to be heard. Said application by Mr. Lehr was denied in all respects by the courts below.

THE RELATIONSHIP

Jonathan Lehr and Lorraine met in 1971. Their relationship was sporadic until 1974, when they began living together in Westchester County.* At that time, Lorraine already had a 1½ year old child, Renee, who had been born out-of-wedlock (A-22).**

At the time that they began living together, Mr. Lehr was 22 years of age and Lorraine was 19 years of age. They had

* Prior to the time that Lorraine began living with Mr. Lehr, she had lived sporadically with Mr. Lehr's mother. (A-58)

** Mr. Lehr was not the father.

lived together for approximately two years prior to the birth of Jessica M (A-23). During this period of time, Jonathan Lehr was of great assistance to Lorraine and her daughter Renee and acted as Renee's surrogate father (A-23). This is confirmed by Appellant's mother, Helen Lehr, who also had a close relationship with Lorraine and even acted as her surrogate mother when she was not welcome in her own home (A-58). During this period Lorraine had emotional problems and even attempted to take her own life (A-215). While they were living together, Jonathan Lehr was attending school.

Jessica M was born on November 9, 1976. After her birth,* Mr. Lehr visited Lorraine each day at the hospital during father's visiting time (A-27). Throughout her pregnancy and even after the birth of Jessica M, Lorraine had acknow-

* Mr. Lehr's mother had paid for the medical bills arising from Jessica's birth (A-26).

ledged to friends and relatives that Mr. Lehr was the father of Jessica M (A-25,26, 60).* During her pregnancy, Lorraine was engaged to Mr. Lehr (A-61). Lorraine does not deny anywhere in the record that Mr. Lehr is the father of Jessica M, and Jonathan Lehr continually has acknowledged that he is the father.**

Subsequent to the birth of Jessica M, and after Jonathan Lehr visited with her and Jessica M in the hospital, Lorraine engaged upon a course of conduct designed to frustrate and hinder Jonathan Lehr from establishing a relationship with Jessica M. After Lorraine's release from the hospital until August, 1978 (a period of ap-

* Lorraine even told Mr. Lehr that she had reported to the N.Y.S. Dept. of Social Services that he was the father. (A-26)

** The only statement made by Lorraine with respect to this issue is in her reply affidavit (A-149), where she states: "...finally I repeat and reiterate that I have never conceded in any court proceeding anywhere nor do I now concede for the purpose of this proceeding, that Jonathan Lehr is the father of my child." This, of course, is not a denial of paternity. (A-221)

proximately 20 months), Lorraine concealed, from Jonathan, the whereabouts of herself and the infant, Jessica M, for approximately 14 months of that 20 month period (A-32, 33). Lorraine admits that she concealed her whereabouts and that of Jessica, but she disputes the amount of time (A-146). Lorraine stated that, "I had no duty to report my whereabouts to anyone." (A-148). Lorraine's concealment of the location of herself and Jessica is confirmed by Mr. Lehr's mother, Helen Lehr (A-62).

During this period of time, Jonathan made numerous attempts to locate her and was successful on a number of occasions (A-28,29). During those times, when Lorraine would let him, Jonathan would see Jessica M. Jonathan also offered to give Lorraine financial assistance for Jessica which Lorraine refused (A-32).

Mr. Lehr made inquiries of Lorraine's

friends, as well as made use of a detective agency to locate Lorraine and Jessica (A-30).

In August of 1978, Jonathan Lehr finally determined Lorraine's whereabouts. She was living in Milton, New York, under her married name, Lorraine Robertson (A-31).* Lorraine, in a telephone conversation with Jonathan, told him to stay away or be arrested (A-31). Having nowhere else to turn, Jonathan sought legal advice in December of 1978.

On December 12, 1978, Jonathan's attorney forwarded a letter to Lorraine, requesting that Lorraine communicate with him so that arrangements could be made for Jonathan to visit with Jessica M (A-76). No response was forthcoming from that letter, and on January 8, 1979, a second letter was forwarded by Jonathan's attorney.

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* Lorraine had apparently gotten married on August 28, 1977 (A-81).

This letter was "refused" (A-77,78).*

CHRONOLOGY OF PROCEEDINGS IN THE LOWER COURT

December 21, 1978 - Petition for Adoption is filed by Lorraine and Richard Robertson in Family Court (A-79). This is nine days after Mr. Lehr's attorney mailed a letter to Lorraine (A-79). No notice is given to Appellant of this petition.

January 8, 1979 - Lorraine refuses to accept a second letter from Lehr's attorney (A-77).**

January 15, 1979 - Adoption hearing held, with Lorraine giving her consent and submitting an affidavit stating that there was no person entitled to notice of the adoption proceedings (A-135).***

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* It became apparent later why no response was made by Lorraine. Within a few days after receiving this letter, she and her husband commenced the adoption proceedings.

** At this time adoption proceedings were already pending.

*** Pursuant to Section 115 of the N.Y. Domestic Relations Law, Lorraine was required to submit this affidavit indicating that there was no putative father who fit into any of the seven categories of unwed fathers entitled to (continued)

January 30, 1979 - Still without knowledge of the adoption proceedings, Lehr files a paternity petition in Westchester County Family Court. In this petition, Lehr asks the Court to (i) declare him the natural father of Jessica, (ii) fix payments to be made by Lehr for Jessica's support, and (iii) provide for Lehr to have visitation privileges with Jessica (A-73).

February 22, 1979 - Lorraine receives notice of Appellant's paternity petition.

February 26, 1979 - Judge Elwyn of Ulster County Family Court is informed by Lorraine's attorney of Lehr's paternity petition (J.S. App. C-3.4). Judge Elwyn signs an order to show cause submitted by Lorraine's attorney to change the venue of the paternity proceeding from Westchester to Ulster County, so that both the pending paternity and adoption proceedings can be

(***continued-) receive notice as set forth in Section 111a-2 (a-g).

held together (A-86).* The Judge stays the paternity petition. He makes that motion returnable on March 12, 1979, the same return date as the paternity petition. Judge Elwyn does not require notification of adoption proceedings to be given to Appellant.

March 3, 1979 - Appellant is served by mail with the change of venue motion (Saturday). The affirmation attached to that motion indicates that adoption proceedings are pending.** This is the first time that Appellant has knowledge, albeit indirect, that adoption proceedings are pending.

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* The affidavit of Lorraine's attorney in support of this order to show cause states: "Since the Ulster County Family Court will necessarily be reviewing and passing upon the best interests of the child in connection with the adoption proceedings, it would be unjust, inefficient, superfluous, and an otherwise waste of time and money for another court to pass upon the same matter at the same time." (A-92)

** See footnote *.

March 7, 1979 - Appellant's attorney phones Judge Elwyn in Ulster County to advise him that he had prepared an order to show cause to stay the adoption proceedings pending the determination of the paternity petition. Judge Elwyn advises the attorney that he had that very morning signed the order of adoption. (A-101) This was five days before the return date of the change of venue motion which he had signed.

April 5, 1979 - Lorraine and Richard Robertson make a motion in Westchester County Family Court to dismiss the paternity petition.

April 23, 1979 - Jonathan Lehr files notice of appeal of March 7, 1979, order of adoption (J.S.A. A-6).

April 24, 1979 - U.S. Supreme Court decides Caban v. Mohammed, 441 U.S. 380 (1979).

June 20, 1979 - Family Court, Westchester County, enters order dismissing paternity

petition without prejudice in view of the final order of adoption (A-227).*

June 22, 1979 - Appellant, after receiving the June 20, 1979 decision of the Family Court, Westchester County, brings on, by order to show cause before Ulster County Family Court, a motion to vacate adoption proceedings and for inspection of sealed records (A-4).

November 26, 1979 - Judge Elwyn of Family Court renders his written decision.

STATUTORY SCHEME

In this appeal, Jonathan Lehr has challenged the constitutionality of two New York statutes which were applied to him by the courts below. These statutes are Section 111 and Section 111a of the Domestic Relations Law of the State of New York. The text of these statutes is set forth in the Appendix to the Appellant's Jurisdictional Statement (J.S. App.F).

* The court indicated that the putative father's right to seek paternity "...must be deemed severed so long as an order of adoption exists." (A-277)

During the course of the court proceedings below, these statutes were amended by the New York State Legislature, said amendments taking effect July 27, 1980.

In order to give the Court a clear view of the statutory scheme, a brief summary of the relevant provisions of the statutes prior to and subsequent to the amendments is offered.

Pre Amendment: Section 111 of the Domestic Relations Law of the State of New York, entitled, "Whose consent required,"* sets forth the classes of parents whose consent is required for the adoption of their children. Included in this classification are, both parents of a child born in wedlock, and the mother of a child born out-of-wedlock. Totally excluded from this class are fathers of children borh out-of-wedlock. Since all parents, other than

* The full text of this statute is set forth in J.S. App. F).

putative fathers, must consent, notice of the adoption proceedings is given to them. Notice to parents whose consent is not required, however, need not be given, and is completely discretionary with the court with no guidelines whatsoever.*

Section 111a of the Domestic Relations Law of the State of New York, entitled, "Notice in certain proceedings to fathers of children born out of wedlock," provides a means of notifying a limited class of unwed fathers of the adoption of their child.** The statute sets forth the seven classes of putative fathers entitled to such notice (See J.S. App. F 13-15).

Section 111a further provides, in subparagraph 3, that "the sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the

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* Section 111.3 (J.S. App. F, 7).
** A full text of this statute appears in the J.S. App. F, 11, et al).

court relevant to the child's best interest."

As Amended: Effective July 27, 1980, these two statutes were amended in part. At the time of such amendments, this case was on appeal to the New York Supreme Court, Appellate Division, Third Department. By virtue of the amendment to Section 111, fathers of children born out-of-wedlock were added to those whose consent would be required to an adoption (Section 111.1 d,e). There were, however, stringent qualifications which the unwed father had to meet before receiving this right to consent. These qualifications were based upon the age of the child (over or under the age of 6 months) and upon the type and extent of the relationship which the unwed father had with the child.* In addition, the statute was amended so as to

* Jonathan Lehr does not claim that he fits within any of these two additional categories since he was prevented by Lorraine from establishing any relationship with Jessica M.

add a provision by which a parent could file an irrevocable waiver of his or her right to consent to the adoption.**

Section 111a was simultaneously amended in two areas. First, an eighth category of unwed fathers was added as being entitled to notice of the adoption proceedings, (Section 111a 2-h J.S. App. F 14,15).

In addition, Section 111a.3 was amended so that the section did not apply to the new class of fathers whose consent was required.

DECISIONS BELOW

In all of the lower courts Lehr claimed that Section 111 and Section 111a on their face and as applied denied him due process and equal protection of the law under the Fourteenth Amendment: (i) He argued that by not requiring that notice of and the opportunity to be heard in the

** This amendment is also not relevant to the instant case.

adoption proceedings be given to him, Section 111a.2 and Section 111.3 violated his procedural due process rights and (ii) by having his parental rights terminated without having the opportunity to be heard as to his fitness and the issue of Jessica's best interests, and without his consent, he was denied his substantive due process rights; and (iii) by providing these rights to all other parents, including unwed mothers, divorced parents, wed parents, and some of these rights to a limited class of unwed fathers, excluding him, he was denied equal protection of the law.

The New York Family Court in Matter of the Adoption of Jessica XX, 102 Misc. 2d 102 (1979),* rejected all of Lehr's claims. It held that the New York statutes in question were constitutional, and that the court was justified in relying

* J.S. App. C.

upon the statutes which provided no notice to Lehr:

> "The putative father here did not qualify as a father entitled to notice under Section 111a and that the court was under no duty to require the petitioner to give notice not required by the statute."**

The court further denied Lehr's equal protection argument on the ground that the statutes were reasonable and rational.***

The New York Supreme Court, Appellate Division, Third Department in Matter of Jessica XX, 77 A. D. 2d 381 (1980), affirmed the Family Court decision, finding that the statutory framework was constitutional and that the lower court had properly relied upon those statutes in denying Lehr notice and the opportunity to

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** J.S. App. C-6 - the lower court judge did not give any explanation as to why he signed the order of adoption 5 days before the return date of the change of venue motion nor did he explain why he did not use his discretionary authority under Section 111.2 to give Jonathan Lehr notice.

*** As will hereafter be shown, the lower court applied the incorrect standard for Lehr's claimed

be heard.* The Appellate Division made no evaluation of Lehr's equal protection arguments.

The New York Court of Appeals, in Matter of Jessica XX, 54 N.Y. 2d 417 (1981), recognized Lehr's constitutional claims, but rejected them and affirmed the decisions of the lower court. The Court of Appeals chose to dispense with all of the aforesaid constitutional claims of Lehr on the sole basis of denying retroactivity to the case of Caban v. Mohammed, 441 U.S. 380 (1979). The Court of Appeals examined the legislative history of Section 111 and Section 111a and indicated that these statutes complied with the United States Constitution and that the lower court's use of these statutes to deny Lehr notice and the opportunity to

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gender-based classifications under the Fourteenth Amendment to the United States Constitution. cf Craig v. Boren, 429 U.S. 190 (1976).

* The dissent, however, recognized that Lehr had done more than the statute (Section 111a) re-

be heard at the adoption hearings, was correct.**

As a result of the lower court rulings, the adoption of Jessica M has been confirmed, thereby forever terminating all parental ties between Jonathan Lehr and Jessica M.***

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quired and that he was a "...readily identifiable person under the spirit and intent of the statute." As the dissent stated, his status was terminated in a manner "...inconsistent with due process." (J.S. App. B 5,6).

** J.S. App. A 10, et al - The Court of Appeals did not comment upon the conduct of the Family Court Judge in signing the order of adoption before the change of venue motion was returnable, which conduct the dissent characterized as nothing less than an abuse of discretion (J.S. App. A 18).

*** In New York, an adoption severs all ties between an unwed father and his child. See Section 117 of New York Domestic Relations Law (App. B) attached to this brief.

SUMMARY OF ARGUMENTS

Jonathan Lehr, as the putative father of Jessica M, has a liberty interest in maintaining his relationship with his daughter, which is within the Fourteenth Amendment's protection of liberty and property. Any proceedings which sever this relationship must take cognizance of Lehr's claim to treatment in accordance with the Due Process Clause of the Fourteenth Amendment. Stanley v. Illinois, 405 U.S. 645 (1972).

In New York a completed adoption constitutes a final termination of all parental rights of a putative father (New York Domestic Relations Law, Section 117). As this Court has recently stated, "Few forms of state action are so severe and irreversible." Santosky v. Kramer, 102 S.Ct. 1388, 1397 (1982). Despite the need for "heightened" procedural due process safeguards in such

proceedings, the New York statutory scheme, and, in particular, Section 111 and Section 111a of the Domestic Relations Law, on their face and as applied to Lehr by the New York Court of Appeals, denied him the most rudimentary of all procedural due process requirements: notice and the opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545 (1964).

By not requiring notice of an adoption proceeding to be given to known putative fathers such as Lehr, the New York statutory scheme increases the risk of erroneous adoptions and countermands its own governmental interests of parens patriae and finality. By giving putative fathers, such as Lehr, "his day in court," the State's administrative and fiscal burden would be de minimus.

Gender-based statutory classifications, such as contained in Section 111 and Section 111a, in order to meet the

scrutiny of the Equal Protection Clause, must serve important governmental objectives and must be substantially related to the achievement of those objectives. Craig v. Boren, 429 U.S. 190, 197 (1976). Said statutes denied Jonathan Lehr notice and the opportunity to be heard on the sole basis of his sex. Such a classification is invidious and violates the Equal Protection Clause.

Said statutes, by requiring that notice and a hearing be given to all other parents, including unwed mothers and certain putative fathers, and not to Lehr, were based on the irrebuttable presumption that Lehr was unfit. The categories of Section 111a serve only the interests of speed and efficiency which, in this case, countermands the State's objectives of finality and fostering the child's best interests. This is procedure by presumption and is unacceptable under the Equal

Protection Clause. (Stanley v. Illinois, supra).

There is no reason to deviate from the presumption that the holding of Caban v. Mohammed, 441 U.S. 380 (1979) should be applied to the facts and circumstances of this case. Caban, supra, did not establish a new principle of law, but merely expanded this Court's prior holdings in the area of putative fathers' rights and equal protection (Stanley, supra). Assuming Lehr has not waived his right to consent to Jessica's adoption under New York law, it cannot be presumed that he will not use this right in Jessica's best interests.

POINT I: APPELLANT CONTESTED THE CONSTITUTIONALITY OF THE NEW YORK STATUTES AS CONSTRUED AND APPLIED TO HIM IN ALL OF THE COURTS BELOW AND THE NEW YORK COURT OF APPEALS, BY RULING AGAINST HIM IMPLIEDLY AND NECESSARILY REJECTED APPELLANT'S CLAIMS AND UPHELD THE NEW YORK STATUTES THEREBY GIVING THIS COURT JURISDICTION OF THIS APPEAL.

The statutory basis upon which Appellant is requesting that this Court review the New York Court of Appeals decision, Matter of Jessica XX, 54 NY2d 417 (1981), is based upon 28 USC 1257(2),which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ....
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Thus, the requirements which must be met by Appellant for this Court to exercise its appeal jurisdiction are as follows:

(1) There must be a final judgment

rendered by the highest court of the State; and

(2) There must be drawn in question the validity of a State statute on the ground of its being repugnant to the Constitution; and

(3) The decision of the State court must be in favor of its validity.

The Appellees, in their motion to dismiss, have only raised as an issue the third requirement; however, in view of the fact that the Court did not limit its jurisdictional inquiry to that question, Appellant will review all three in order to show his full compliance.

FINALITY: This jurisdictional factor is common to all cases in state courts as to whether a party may seek review in this Court either by way of appeal or certiorari.[1] This requirement can best be summarized by referring to this Court's decision in Market Street R Co. v. Railroad Comm., 324 U.S. 548, 551 (1945):

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1. 28 USC 1257.

> "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

Appellant's rights were finally determined in connection with these proceedings. The Opinion and Judgment and Remittitur of the Court of Appeals concluded the controversy as to all parties to the appeal. See Meagher v. Minnesota Thresher Mfg. Co., 145,U.S. 608,611(1892). The order of adoption remains final, and the records of the adoption proceedings remain sealed. The Court of Appeals of the State of New York is the highest state court, as well as the court of last resort.[2] There can be no further review in any other state tribunal.[3]

RAISING OF SUBSTANTIAL FEDERAL QUESTION; VALIDITY OF STATE STATUTE DRAWN IN QUESTION:

Appellant raised the Federal question in

2. This has been recognized by the Court in cases such as Street v. U.S., 394 U.S. 576 (1969).
3. Market Street R Co. v. Railroad Comm., 324 U.S. 548, 551(1945) Department of Banking v. Pink

all three previous levels of state court review, as well as in his Jurisdictional Statement.

The underlying basis of Appellant's arguments was and remains the fact that the statutes in question, to wit, Section 111 and Section 111a of the Domestic Relations Law, as construed and applied to him by the state courts, have deprived him of his constitutionally protected rights of due process and equal protection under the Fourteenth Amendment of the United States Constitution. It was the said statutes, as so construed and applied, which denied Jonathan Lehr notice of the adoption proceedings as well as the opportunity to be heard therein.[4] It further prohibited him from proving his fitness, testifying as to the best interests of Jessica M. and exercising his right to

317 U.S. 264,268(1942)

4. Section111a.2 sets forth categories of putative fathers entitled to notice, while Section 111.3 gives the court discretion to send notice to parents whose consent is not required.

consent or withhold his consent to the adoption.[5] Thus, the validity of said statutes was "drawn in question in a manner directly bearing on the merits of the action." See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476,(1975).

The Appellant first raised these claims at the trial court level in the Family Court of Ulster County,[6] citing numerous cases including Stanley v. Illinois, 405 U.S. 645 (1972), and Caban v. Mohammed,[7] 441 U.S. 380 (1979).

The Ulster County Family Court Judge, in his decision (J.S. App. C), rejected

5. Appellant claimed that Caban, supra, should be retrospectively applied to this case.
6. See J. S. App. H for excerpts for Appellant's petition in the Family Court proceeding. See also Joint Appendix A-9, 39-46 for complete petition and reply affirmation of David J. Freeman, Esq. (A-156, 187, et seq.) for further clarification of the constitutional issues raised.
7. As will hereinafter be shown, the Court of Appeals failed to recognize that appellant used pre Cabancases to support his arguments.

these arguments. The court held Section 111a was constitutional in light of Stanley v. Illinois, 405 U.S. 645 (1972), [8] (J.S. App. C 16).

The Appellant again reiterated these same arguments in the Appellate Division, Third Department. Notice and an opportunity to be heard were essential before there could be a final termination of parental rights.[9]

The Appellate Division, Third Department recognized that Stanley v. Illinois, supra, as interpreted by the New York Court of Appeals in Malpica Orsini, 36 N. Y.2d 568(1975)app. dsm'd sub nom Orsini v. Blasi 423 U.S. 1042 (1976) required that notice and an opportunity to be heard be

8. The Family Court recognized that while Caban supra, could be applied retroactively, this case did not warrant such application since Lehr was not a party to the original adoption proceedings. (J.S. App. C 20).
9. Stanley v. Illinois, supra.

given to unwed fathers.[10] However, the Appellate Division concluded that since Appellant had not exactly fit into any of the categories of Section 111a.2, he had no right to notice. The Appellate Division indicated, "...nor do we find any constitutional infirmity in this section. (Section 111a)."[11] (J.S. App. B, 4). The Appellate Division further rejected Appellant's arguments that Caban v. Mohammed, supra, shoud be retroactively applied. (J.S. App. B, 4).

In the Court of Appeals, Appellant reiterated his constitutional challenges. First, that the statutes, as construed herein by the courts, violated his due process and equal protection rights under

10. The Appellate Division indicated "...notice and an opportunity to be heard must be afforded an unwed father before his parental rights are terminated." (J.S. App. B, 3).
11. The Appellate Division did not address itself to the constitutionality of Section 111.

pre Caban v. Mohammed law;[12] and second, that if the rule of law annunciated by this Court in Caban v. Mohammed, supra, was to be applied to this case (although decided six weeks after the order of adoption was signed), said statutes would also be rendered unconstitutional. These arguments were set forth alternatively, and either, standing on its own, would constitute a sufficient basis to declare said statutes unconstitutional.[13]

The Court of Appeals, in its decision, acknowledged that Appellant had raised

12. Appellant cited Stanley v. Illinois, supra, Armstrong v. Manzo 380 U.S. 545 (1965); Goldberg v. Kelley 397 U.S. 254 (1970); Craig v. Boren, 429 U.S.190 (1976) and others.

13. This two-fold attack was mentioned in Point III of appellant's brief. See J.S. App. I,J for excerpts from brief and appendix C (attached to this brief for further excerpts). It should be noted that this Court has looked to briefs to see if the constitutional issue was raised. As Justice Harlan stated in Street v. N.Y.,394 U.S.576, 582 (1969): "...there appears to be no doubt that the issue of the constitutionality of the 'words' part of the statute was raised in Appellant's briefs in both the Appellate term and the Court of Appeals...".

constitutional claims. As Judge Jones indicates:

> "In this perspective we first address the constitutional contentions advanced by the Petitioner. He asserts that as Jessica's father he had a constitutional right to receive formal notice of the adoption proceeding (and thus to participate therein), and that granting the order of adoption without his consent deprived him of his constitutional right. He argues that to the extent that Section 111a did not require that he be given formal notice of the adoption proceeding and that Section 111 did not provide that his consent was required before Jessica could be adopted each section is unconstitutional as denying him the equal protection and due process rights enunciated in Caban." (See J.S. App. A 5,6).

Instead of analyzing, however, Appellant's constitutional contentions based on pre Caban v. Mohammed law, the majority decided to analyze Appellant's entire constitutional argument in terms of whether Caban v. Mohammed, supra, should be retroactively applied to the facts of this

case.[14] Once having decided that it was not retroactive, the Court prematurely terminated its discussion of Appellant's other constitutional arguments. This omission, however, does not affect Appellant's claim that the Federal question was timely and adequately raised.[15]

14. The dissenting opinion recognized the majority's failure to analyze Appellant's constitutional claims based upon pre Caban v. Mohammed law. Chief Judge Cooke stated: "The decision of the Supreme Court in that case (Caban v. Mohammed) however, does not resolve all of the issues presented on this appeal. Under pre Caban law, it was recognized that a putative father is entitled at least to notice and an opportunity to be heard concerning whether adoption would be in his child's best interests (see Quilloin v. Walcott, 434 U. S. 246... other cases and law review articles cited." (J.S. App. A 14).

15. See Street v. New York, 394 U.S. 576, 584 (1969), and New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) where the Court indicated:

> "No particular form of words or phrases is essential, but only that a claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. (footnote omitted)."

Jonathan Lehr has clearly met his burden of showing that the Court of Appeals' failure to confront his constitutional claims was not for want of proper presentation.[16.]

VALIDITY OF STATUTE UPHELD BY STATE COURT.

The Appellees, in their motion to dismiss the appeal, claim that the state court did not pass upon the validity of Section 111 and Section 111a. The Court of Appeals, however, in order to render its decision, necessarily and impliedly had to uphold the validity of said statutes.

A state court may impliedly have upheld that statue's validity without directly indicating the same. As Justice

16. See Street v. New York, supra, where the Court stated that when "...the highest state court has failed to pass upon a Federal question, it will be assumed that the omission was due to want of proper presentation in state courts, unless the aggrieved party in this court can affirmatively show the contrary." See also New York Central R.R. Co. v. New York, 186 U.S. 269,(1902) 273; see Oxley Stove Co. v. Butler, 166 U.S. 698, 645,(1897)

rectly indicating the same. As Justice Van Devanter states in New York Ex Rel Bryant v. Zimmerman, 278 U.S. 63, 67, (1928), in quoting the Court in Street v. New York, supra: "Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough...." [17] In Bryant, supra, the Court looked to the opinion of the Appellate Division, which passed on the constitutional issue and indicated that the Appellant did not abandon these arguments in the State Court of Appeals. [18]

17. In Bryant, supra, despite the fact that the state court did not mention the Fourteenth Amendment, but only stated that Appellant was asserting the unconstitutionality of the statute and that it deprived him of his liberty without due process, the Court held that the statute was upheld.

18. As noted previously both the Family Court and the Appellate Division clearly passed upon Mr. Lehr's constitutional claims.

Thus, the failure of the state court to address the constitutional issue is not determinative. See Chambers v. Mississippi, 410 U.S. 284 (1973).

The Court of Appeals here, however, did address itself to the constituional issues raised and held that:

> "Accordingly, we hold that Sections 111 and 111a of the Domestic Relations Law as invoked in the adoption proceeding here are immune from constitutional assault predicated upon Caban and its rationale in the present post final determination proceeding. (cf. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107)" (Footnote omitted)."

Thus, the Court impliedly upheld the validity of the statutes involved by recognizing and denying one of Appellant's arguments.[19] To further illustrate how the

19. The Court of Appeals acknowledged that the Appellant had not relied solely on Caban by stating: "He would rely heavily on the decision of the Supreme Court of the U.S. in Caban v. Mohammed (441 U.S. 380 supra)...." (J.S. App. A-5). Appellant, however, based its entire due process argument upon pre-Caban cases such as Stanley v. Illinois, supra, and others. (J.S.App. I,J; App. C to brief).

court enforced and applied the statutes in question, we need to look only to the court's reasoning for denying the Appellant's claim that the lower court judge had abused his discretion in failing to give the Appellant notice. The court expounds on the legislative history of Section 111a[20] and then indicates that if the Family Court Judge had given Appellant notice, he "would have been acting in derogation of the legislative determination not to include such putative fathers within the scope of Section 111a."[21] Thus, the Court of Appeals clearly used the validity of the statute to uphold and validate the actions of the Family Court Judge. As the Court states in Dahnke-Walker Co. v. Bondurant , 257 U.S. 282 (1921):

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20. See Court of Appeals Opinion (J.S.App.A 10).
21. (J.S. App.A 11) The Court also stated that if notice were given to Lehr "...we would in effect be superimposing a judicial amendment on subdivision 2 of Sec. 111a".(J.S.App. A 10)

> "The Court did not accede to this insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied." Cases cited.

The very basis of each and every part of the Court of Appeals decision is that the statutes in question were correctly applied to Appellant, and, therefore, he was not entitled to notice of the adoption proceedings. The Court of Appeals unequivocally held the statutes in question applicable to the facts of this case despite Appellant's contention that such application is invalid on Federal grounds. That is enough to give this Court jurisdiction pursuant to 28 USC 1257(2).[22.]

IN THE ALTERNATIVE. Assuming this Court does not hold that it has jurisdiction to review the decision of the New York State Court of Appeals pursuant to 28 USC 1257

22. See Bantam Books v. Sullivan, 372 U.S.58, 61 N.3 (1963); Cohen v. California, 403 U.S.15,17, 18 (1971); U.S. v. Knox, 396 U.S. 77, 79, (1969) n.2

(2), then it is mandated by 28 USC 2103 that the Court treat the Jurisdictional Statement submitted herein as a petition for a writ of certiorari. It is then within the Court's discretion to grant certiorari even if the question of jurisdiction was postponed to a hearing of the case on the merits. See Anonymous v. Baker, 360 U.S. 287, 290 (1959); Slagle v. Ohio, 366 S. S. 259, 264(1961) Garrity v. New Jersey, 385 U.S. 493, 496 (1967).

For the reasons set forth in Appellant's Jurisdictional Statement, it is submitted that sufficient grounds exist for this Court to grant certiorari pursuant to 28 USC 1257(3).

POINT II - APPELLANT HAS A LIBERTY INTEREST THAT WAS TERMINATED WITHOUT DUE PROCESS OF LAW WHICH REQUIRED, AT THE VERY MINIMUM, THAT HE BE GIVEN NOTICE OF THE ADOPTION PROCEEDINGS AND THE OPPORTUNITY TO BE HEARD THEREIN.

LIBERTY INTERESTS. The Court in Stanley v. Illinois, 405 U.S. 645 (1972), ruled that a putative or unwed father[23] has such a significant and cognizable liberty interest in his child that he must be afforded notice and a hearing when that interest is being altered or terminated. As the Court stated in Stanley:

> "It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'. Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter,J. conc.)

23. For the purposes of this brief, the term "putative father" will be deemed to connote "the alleged or reputed father of an illegitimate child". Black's Law Dictionary 1113 (5th ed. 1980) "Putative father" and "unwed father" shall also be deemed synonymous.

> The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed 'essential', Meyer v. Nebraska 262 U.S.390,399 (1923)...." Id at 651. [24]

This Court, however, has not confined the protection of the liberty interest to a "legal" family. Instead it has couched this protected liberty interest in terms of the "biological" relationship. The Court stated at page 651: "...The law now recognizes "those family relationships' unlegitimized by a marriage ceremony." [25] Thus, a putative father, at least in custody proceedings (as in Stanley), had the same constitutionally protected interest as the legitimate father in a-

24. Also cited, see Skinner v. Okl. 316 U.S. 535, 541 (1942) (basic civil rights of man); May v. Anderson, 345 U.S. 528,533 (1953)(rights more precious than property rights). Prince v. Massachusetts, 321 U.S. 158,166 (private realm of family rights which the state cannot enter).(1944)

25. Levy v. Louisiana, 391 U.S. 68 (1968), and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); see Smith v. Organization of Foster Fa-

doption proceedings (as in Armstrong v. Manzo,[26] 380 U.S. 545 (1965). Since then, the Court has explicitly expanded this interest to be applicable in adoption proceedings.[27]

Neither Stanley, supra, nor any subsequent cases prescribed any conditions precedent which had to be satisfied for putative fathers to receive such protection. There was no requirement that they be adjudicated as the father,[28] nor that they have custody of the child or any relationship with the illegitimate child.[29] The Court in Stanley, supra,

milies, 431 U.S. 816 fn. 53 (1977); Quilloin v. Walcott, 434 U.S. 246 (1978);

26. In Armstrong v. Manzo, 380 U.S. 545, the Court had held that a failure to give notice of an adoption proceeding to the father of a legitimate child constituted a denial of due process under the law.

27. See Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972) where the Court remanded an adoption case to be considered in light of Stanley, supra. On remand in Rothstein, supra, the Wisconsin Supreme Court held that a putative father's rights could not be terminated in an adop-

(27. contd. 28. 29. next page)

thus implicitly recognized that all putative fathers are under the umbrella of protections afforded by the Due Process Clause of the Fourteenth Amendment.[30]

The fact that all putative fathers may be under this umbrella, however, does

tion without notice and a fitness hearing. State Ex Rel Lewis v. Lutheran Social Services , 59 Wisc. 2d, 1,8,10; 207 N.W. 2d 826 830, 831 (1973) It should be noted that the remand by this Court included a direction that the Wisconsin Court consider the fact that the child had been living with the adoptive parents for a period of time. See also Quilloin v. Walcott, 434 U.S. 246 (1978) and Caban v. Mohammed, 441 U.S. 380 (1979)adoption cases, which cite Stanley as requiring a notice and a hearing for putative fathers.

28. Stanley was not an adjudicated father, nor was the father in Quilloin, supra, or Caban, supra, adjudicated.

29. In Stanley, supra, at 657 fn.9, the Court implicitly recognized that unknown putative fathers would have to be notified. The putative father in Quilloin, supra, did not have custody of his child yet was afforded his due process rights. See also May v. Anderson, 345 U.S. 528, 533 (1953); Armstrong v. Manzo, supra. See also generally Comment,"The Emerging Protection of the Putative Father's Parental Rights,"70 Michigan Law Review 1581 (1972).

30. It would be difficult if not impossible for a legislature or court to set forth a series of objective standards to determine whether a putative father has a constitutionally protected liberty interest. See Id Comment, 70 Mich. Law Rev. 1581 (1972).

not mean that they will all receive the same procedural and substantive due process rights in proceedings to terminate their parental rights. Some unknown putative fathers might receive notice of the adoption proceedings in a different manner,[31] while some may be unable to prove at a hearing that they have established a sufficient relationship with the child to prevent an adoption.[32] Thus, at the very minimum, a putative father must be entitled to procedural due process of notice and the opportunity to be heard.[33]

31. See Stanley, supra, at 657 fn. 9 where unknown putative fathers might have to receive notice by publication.

32. See Quilloin v. Walcott, 434 U.S. 246 (1978) cf. Caban v. Mohammed, 441 U.S. 380 (1979).cf. Lassiter v. Dpt. of Social Services, 452 U.S.18 (1981) where the Court indicated that "...The fundamental liberty interests of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents."

33. In view of the fact that many putative fathers may not have been adjudicated prior to adoption proceedings, the issue of paternity is the first issue which a court would decide in any adoption or termination of parental rights proceeding. Peter Stanley had to prove paternity,

In Quilloin v. Walcott, 434 U.S. 246, 253 (1978), the Court also correlated procedural due process rights with the constitutionally protected relationship between parent and child.[34.]

Stanley's recognition of a natural parent's fundamental liberty interest and therefore, protection by the Due Process Clause of the Fourteenth Amendment in cases involving the termination of parental rights, has most recently been recognized by this Court in cases involving the termination of parental rights. (Santosky v. Kramer, 102 S.Ct.1388(1982).[35.]

as did the putative father in Quilloin v.Walcott, supra.

34. Quilloin v. Walcott, supra, at 253, where the Court indicated that a putative father is entitled to a due process hearing on his "...individualized interests in his child, prior to the entry of an order of adoption."

35. In Santosky v. Kramer, supra, the Court referred to its "...historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment...." Cases cited include Stanley v. Illinois, supra, and Quilloin v. Walcott, supra. In New York, an adoption is a permanent termination of parental rights. See New York Family Court Act, Article VI Part 2,

As a putative father, Jonathan Lehr has a cognizable and substantial interest in Jessica.[36] As a known putative father, he has thus met the criteria set forth in Stanley, supra, and the subsequent cases for coming under the umbrella of the Fourteenth Amendment.[37]

Section 641, et seq(McKinneys Consol. Laws Ann.)

36. As the Court can see from the record, there is little dispute that Jonathan Lehr is the natural father. The Appellee natural mother, Lorraine Robertson, never denies Lehr's assertion of being the natural father, although she does state that she does not "concede" that he is the father (A-149).

37. The Court here need not concern itself with the question of whether Stanley's liberty rights are applicable to an unknown putative father. Lehr's identity and whereabouts, as well as his acknowledgement of paternity and concern for Jessica, were known to the lower court, and to the Appellees, at least ten days before the order of adoption was signed, as they had in their possession a paternity petition filed by Jonathan Lehr in the Westchester County Family Court. (J.S. App. C, 3,4).

WHAT PROCESS IS DUE APPELLANT.

Having established that Jonathan Lehr has a liberty interest in maintaining his parental relationship with Jessica M, the next question to be considered is the extent of the process 'due' him under the facts and circumstances of this case. As this Court has stated: "Due process is flexible and calls for such procedural protections as the particular situation demands." Morrisey v. Brewer, 408 U.S. 471, 481 (1972).

In termination of parental rights proceedings,[38] such as adoptions, it has been recognized by this Court that "... persons faced with forced dissolution of

38. See fn. 35, supra.

their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." Santosky v. Kramer, 102 S. Ct. 1388, 1394 (1982).[39] This Court is not precluded from applying its own standards to insure that the State's scheme has met the minimum due process standards applicable in these proceedings. Santosky v. Kramer, supra, at 1395.[40]

To determine the extent of the process 'due' in parental rights termination proceedings, this Court has turned to a 'balancing' approach using three separate criteria. This approach was first used in Mathews v. Eldridge, 424, U.S. 319,335 (1976) and later adopted in other paren-

39. This Court has recognized that proceedings designed to terminate the relationship between parent and child must be "...accomplished by procedures meeting the requisites of the Due Process Clause". Lassiter v. Dpt. Social Services, 452 U.S. 18, 37 (1981)(dissenting opinion).

40. The Court also cites Vitek v. Jones,445 U.S. 480, 491 (1980).

tal rights termination proceedings.[41] Those three factors are: (i) The private interest affected by the proceeding; (ii) The risk of error created by the State's chosen procedure; and (iii) The countervailing governmental interest supporting the use of the challenged procedure.

PRIVATE INTEREST. "The extent to which individual due process must be afforded a recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'." Goldberg V. Kelley, 397 U.S. 254, 262, 263 (1970); quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring). The parental relationship with a child is a right "far more precious than a property right."[42]

41. See Lassiter v. Dpt. of Social Services, 452 U.S. 18, 27-31 (1981); Santosky v. Kramer, supra, at 1394.

42. Stanley v. Illinois, supra, at 651. This concept was reiterated in Lassiter, supra at 27 and Santosky, supra at 1397.

In an adoption proceeding, such as in the instant case, the effect of the adoption is final and irrevocable once the appellate process has been exhausted.[43] As the Court stated in Santosky, supra: "Few forms of state action are so severe and so irreversible."[44] The right to receive notice and be accorded a hearing before Lehr suffered his "grievous loss" was the minimum of safeguards which he should have received. As the Court stated in Joint Anti Fascist Committee v. McGrath, 341 U.S. 123 (1951): "This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind...is a principle basic to our society."[45] id. at 168.

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43. See N.Y. Domestic Relations Law, Section 117 (App. B to brief).

44. 102 S. Ct. at 1097.

45. See also Fuentes v. Shevin, 407 U.S. 67 (1972) (Right to hearing before being deprived of automobile in a replevin action). Boddie v. Connecticut, 401 U.S. 371, 378, 379 (1971) (Hearing must

Adequate notice, of course, follows the right to a hearing. The "...right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane, v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). Instead, however, of receiving these safeguards, Mr. Lehr was treated by the New York statutory scheme (Section 111 and 111a) as a "non-person" with no interest at all in Jessica M. It has been established, however, that a state cannot constitutionally deprive a putative father of this interest without first affording him an 'individualized'hearing.[46] Until a state can prove

(45. cont'd) take place before deprivation of rights except for "...extraordinary situations... that justifies postponing the hearing until after the event.") Bell v. Burson, 402 U.S. 535, 542(1971) (Right to a hearing before being deprived of a driver's license).

46. See Stanley, supra, (fitness hearing), and Quilloin, supra, (hearing on individualized interests).

parental unfitness[47]; both Mr. Lehr and Jessica M share a vital interest in preventing an erroneous, permanent termination[48] of their natural relationship.

Thus, while the balance of the private interests herein favors heightened procedural safeguards, Jonathan Lehr has received none.

RISK OF ERRONEOUS DEPRIVATION.

Turning to the second factor under Mathews v. Eldridge, supra, we now must

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47. In Santosky, supra, the Court points out at 1397 fn.9 "nor is it clear that the State constitutionally could terminate a parent's rights without showing unfitness. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978) 'We have little doubt that the Due Process Clause would be offended '[i]f a state were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so would be in the children's best interest'" quoting Smith v. Organization of Foster Families, 431 U. S. 816, 862, 862...". The N.Y. Court of Appeals in In Re Corey L v. Martin L, 45 N.Y. 2d 383,391 (1978) has recognized that the best interest test does not come into focus until the parent entitled to consent has been shown to have abandoned the child.

48. The Court in Santosky, supra, at 1398, fn.11,

consider both the risk of erroneous deprivation of private interests resulting from the use of New York's notice and hearing requirements for putative fathers, and the likelihood that a higher evidentiary standard would reduce that risk. See id. at 335.

Section 111 and Section 111a, as construed by the lower courts herein and as applied to Jonathan Lehr, create an unacceptable risk of error in two instances. First, that a known putative father who has exhibited a concern for his child, such as Jonathan Lehr, might not receive notice of an adoption proceeding. Secondly, without the presence of such a putative father, there is a risk that an erroneous adoption would take place.

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points out possible "far-reaching" consequences for a child, i.e., loss of right of support; right to inherit.

Section 111.3 of the Domestic Relations Law (J.S. App. F-7) merely gives the judge presiding over the adoption proceeding discretion to give notice to persons whose consent to an adoption is not required, to wit, unwed fathers. There are no standards by which this discretion may be measured. Thus, under this provision there is the possibility that no unwed father would receive notice.[49] In fact, Jonathan Lehr was not

49. Prior to the amendment of Section 111, effective July 27, 1980, no unwed father had the right to consent and, therefore, there was no requirement of notice to an unwed father, except for the 7 categories set forth in Section 111.a. While the new Section 111, as amended, adds two classes of unwed fathers whose consent is required (Section 111.1d,e, see J.S.App. F2-4), there is no way of knowing if an unwed father fits into either of these two classes until a hearing is held to determine whether such unwed fathers meet the criteria. It would therefore appear that, for these consent rights to be meaningful, the new Section 111 would have to require notice to all putative fathers in order to "weed out" those whose consent is required. Moreover, neither Section 111 nor Section 111a requires notice to all putative fathers. Thus, it appears that under the new statutory scheme, some fathers who have the right to consent may not be (cont'd)

given notice under this provision by the Family Court Judge.[50]

Section 111a.2, on the other hand, does provide for notice of adoption proceedings to seven classes of unwed fathers (J.S.App. F 13-14);[51] however, these categories do not include many concerned and caring putative fathers, who, because of their exclusion from the cate -

(49. cont'd) notified as they may not be in the 7 classes of putative fathers entitled to notice.

50. Chief Judge Cooke, in writing for the dissent, questioned the majority's finding that the Family Court Judge would have acted contrary to the legislative intent had he used Section 111.3 to give Mr. Lehr notice. "Having identified a statutory source of authority for giving notice, the majority nonetheless justifies the failure to give notice because of an absence of specific authority." (J.S. App. A 15 fn.1)

51. As with Section 111, Section 111a was amended, effective July 27, 1980, to include an eighth category of unwed fathers entitled to notice, to wit, one who has filed an instrument acknowledging paternity in the putative father registry (see J.S. App. F 14, 15). Appellant herein did not file such a statement.

gories, may have their parental rights terminated because of no notice. Of the categories listed in Section 111a, only one is any way indicative that the putative father has an ongoing relationship with the child, to wit, Section 111a.2 52. (e). Even that category is unrealistic as it requires the putative father to be living with the mother and the child. The following scenario clearly depicts the high risk that a concerned, caring, fit and competent unwed father may not be notified of or heard in proceedings de-

52. That section gives notice to a putative father who is openly living with the child and the child's mother and is holding himself out as the father. Other categories suggest no ongoing relationships or concern, i.e., putative father's name on birth certificate; putative father filing a notice of intent to claim paternity. In addition, there is the possibility that an alienated mother could deceive a putative father by telling him that he was named on the birth certificate or that she had named him in a sworn statement. (Here, Lorraine indicated to Lehr that she had notified the Dept. of Social Services of his status (A-26).

signed to sever his parental rights.[53] Assume a man and a woman may be living together, perhaps with the intention of marrying at a future date. The woman becomes pregnant and gives birth. The couple lives together and begins raising the child as if they were married. Some months later (or perhaps years), the couple separates, but the father continues to visit with the child and maintains a relationship. Since everyone knows of the illegitimacy of the child, the putative father never takes any steps to formalize his parenthood, nor does he file in any registry, nor does he comply with any other requirements in Section 111a.[54] The mother then marries, and the

53. Once again it should be noted that the "relationship" is not an index as to whether notification is given. The relationship merely bears on the question of substantive rights, i.e. the right to veto. See Quilloin v. Walcott, supra. See also Stanley, supra, where fitness can only be determined after a hearing.

54. Jonathan Lehr also had no reason (cont'd)

new father wishes to adopt the child. Under New York law, Section 111 and Section 111a, this father is not required to be given notice of the adoption proceedings, and his parental rights would be forever terminated. On the other hand, a putative father who had filed a notice with the putative fathers' registry at the time of birth but, thereafter, never saw the child, would receive notice. While it is not here being alleged that Jonathan Lehr had such a relationship with Jessica, it is being alleged that Jonathan Lehr is a putative father who

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(54. continued) since everyone knew he was the father (A-36). In many instances, a putative father might have absolutely no knowledge of such a registry, or of the requirements of the Public Health Law, Section 4135, requiring a verified statement to be filed by a putative father to have his name placed on a birth certificate. Appellant did not (A-36). In Quilloin, supra, at p. 254, the court pointed out that it would not want to base the termination of parental rights on a statute of which the putative father had no knowledge.

was known and who expressed his desire to create such a relationship.[55] Further, since many unwed fathers are members of minority groups, poor or uneducated, they would have very little chance of knowing of the requirements of Section 111a such as registering in a putative father registry.[56]

Under the New York statutory scheme, the risk of known and concerned fathers not being notified of, and heard in, proceedings to terminate their parental rights is not insubstantial.[57] The absence of these concerned putative fathers then creates the further risk that the adoption proceedings may be erroneous.

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55. The statutory scheme in New York also makes no provisions for the situation herein, where the mother prevents the putative father from establishing a relationship by concealing the child's whereabouts. New York case law has recognized the right of a putative father to associate with his child. Pierce v. Yerkovich, 80 Misc. 2d,613(1974)

56. This factor was considered in Santosky v. Kramer, supra at 1399.

57. See Memphis Light & Gas Co. v.Craft, 436 U.S. 1 (1978) (risk of erroneous "turn-off" not

At an adoption hearing a putative father would be entitled to testify as to his fitness,[58] the child's best interest,[59] and to any other matter he thought relevant.[60] Thus, there is the risk of fit fathers being separated from their children without being notified.[61] Further, where subjective analysis is involved in determining the best interests of a child, the court must base its conclusion on numerous factual assertions made by the parties. The presence of the putative father in the adoption proceedings may clarify and bring to surface facts which affect the qualifications of the adoptive parents which they might not wish to di-

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insubstantial).

58. Stanley v. Illinois, supra.

59. New York Domestic Relations Law, Section 111a.3.

60. Quilloin v. Walcott, supra, 253.

61. "A state registers no gain towards its declared goals when it separates fit children from the custody of fit parents." Stanley v. Illinois, supra, at 652.

vulge.[62] Because the termination of parental rights, as in an adoption proceeding, is such a unique kind of deprivation, the natural parents' interest and the child's interest in the accuracy and justice of the decision to terminate is a "commanding one". See Santosky v. Kramer, supra. Even lacking any veto rights, a putative father may prevent the termination of parental rights by showing that the best interests of the child would not be fostered by the adoption.[63]

62. As the Court indicated in Fuentes v. Shevin, 407 U.S. 67, 81(1971), quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 170-2 (1950) Frankfurter, J., concurring: "...fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."

63. Caban v. Mohammed, supra, at page 387. It is not uncommon for a putative father to submit or elicit evidence which would lead the court to hold that an adoption was not in the best interests of the child. See Matter of Gerald GG, 61 App. Div. 2d 521 (1978), where based upon the emotional instability of the natural mother, the court rejected the adoption. This is not dissimilar to the emotional instability of Lorraine which Lehr would have made available to the Family Court Judge (A-22-24, 215, 217).

The high degree of risk of such an erroneous adoption cannot be tolerated even where it is argued that such an erroneous termination of parental rights would be rare. "Given the weight of the private interests at stake, the social cost of even occasional error is sizeable". Santosky v. Kramer, supra, p.1400.[64.]

This risk of error cannot be lessened by a court making a hindsight conclusion that a putative father had no valid input as to a child's best interests. The New York Court of Appeals seemed to indicate that the Family Court Judge was correct in not affording Lehr a hearing. "In this instance, the petition and sup-

64. As the Court stated in Stanley v. Illinois, supra, 654 "It may be as the state insists that most unmarried fathers are unsuitable and neglectful parents.(footnote omitted)...But all unmarried fathers are not in this category, some are wholly suited to have custody of their children." See also Memphis Light & Gas v. Craft, 436 U.S.1 (1977) (Where the risk of an erroneous termination is not insubstantial; person being deprived is entitled to present evidence that he is right)

porting papers contained no tender of evidence directly bearing on the best interests of Jessica." (J.S. App. A 12)[65] This is an erroneous interpretation of the requirements of the Due Process Clause. As this Court has stated:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits. Coe v. Armour Fertilizer Works, 237 U.S. 413".[66]

Fuentes v. Shevin, 407 U.S.67,87 (1972).

Notice to Jonathan Lehr and putative

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65. It is difficult to imagine how a court can determine what Lehr's input would be based upon conflicting affidavits. Lehr must be afforded the opportunity to "make his case". Stanley v. Illinois, supra, 655. Where witness testimony and veracity are critical, then written submissions are a wholly unsatisfactory basis for decision. Goldberg v. Kelley, 397 U.S. 254, 269 (1970)

66. In Santosky, supra, at 1403, the Court noted "We of course express no view on the merits of the petitioner's claims(fn. omitted). At a hearing conducted under a constitutionally proper standard, they may or may not prevail."

fathers like him who are known, and who evidenced an interest in their child by formally acknowledging paternity, would reduce the risks discussed. It would include in adoption proceedings putative fathers who have a substantial interest in their children and who would, therefore, place all of the relevant evidence before the Court. Mr. Lehr has as much, if not more, of a claim to notice than does a putative father who has received notice by filing in the Putative Father Registry, and who may never have evidenced any interest in his child.

COUNTERVAILING GOVERNMENT INTERESTS.

The third Eldridge test is to weigh the governmental interest in maintaining the challenged procedure with the fiscal or administrative burdens which would be incurred if the challenged procedure were changed. As stated in Santosky, supra,

at 1401, the two state interests at stake in parental termination proceedings are: (i) The parens patriae interest in promoting the well-being of the child, and (ii) The fiscal and administrative interest in reducing the cost of such proceedings. In order to achieve these interests, the State of New York enacted Section 111a for the purpose of achieving finality in adoptions as early as possible.[67] The challenged procedures, however, are inconsistent with these interests. Notifying Mr. Lehr of the adoption proceedings herein would have been consistent with these state interests.

If the State is genuinely concerned about the well-being of the child, "... it shares the parents' interest in an accurate and just decision...," in the termination of parental rights proceedings.

67. See Court of Appeals decision (J.S. App. A-10).

Lassiter v. Dept. of Social Services, 452 U.S. 18, 27 (1980). "The State registers no gain towards its declared goals when it separates children from the custody of fit parents." Stanley v. Illinois,[68] 405 U.S. at 652. The New York Court of Appeals, in its decision, improperly placed the child's best interests above the fitness of the parents:

> "The Court's principal attention and responsibility in any adoption proceeding must be riveted on the best interests of the adoptive child; only secondarily may consideration be given to the interests of the parents." (J.S. App. A-12).[69]

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68. See also Quilloin v. Walcott, 434 U.S. at 255 quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862, 863 (1977) (Stewart, J. concurring in judgment).

69. This Court in Caban, supra, 441 U.S. at 387, fn.5, rejected the notion that the best interests of the child always determines whether an adoption petition is granted. The Court cited the New York Court of Appeals case of In Re Corey L v. Martin L, 45 N.Y.2d 383, 391 (1978), as unequivocally rejecting this view. See also Smith v. Organization of Foster Families, 431 U.S. 816, 862, 863 (1977) (Stewart, J. conc.) as quoted in Quilloin v. Walcott, 434 U.S. at 255.

As the Court further stated in Santosky, supra, "Any parens patriae interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents have been found unfit" id. at 1401 fn.17. If we adopt the Court of Appeals position, the risk of an erroneous adoption is enhanced and the state's interest is not fostered.

Notification to putative fathers such as Jonathan Lehr would further the state's interest of finality. Had Mr. Lehr been notified, he would have participated in the proceedings as a party and would have been bound by the court's determination subject to appeal. There would be no chance, once appeals have been exhausted, for a collateral attack on the adoption, such as we have here.

70.

70. The sponsor of Section 111a, Senator Pisani, recognized this in his letter: "On the other hand, under-reaction to Stanley, by failing to...provide concerned, adjudicated or other readily identifiable fathers of out-of-wedlock (cont'd)

Notification of adoption proceedings to putative fathers such as Mr. Lehr would also not substantially increase the fiscal burdens upon the State since the cost of notifying a putative father such as Mr. Lehr, whose identity and whereabouts are known, would be minimal, i.e. the cost of personal service and/or mailing. In addition, affording Mr. Lehr a hearing herein would not increase the administrative burden nor increase the fiscal burden as the New York statutory scheme (Section 111a.3) has already contemplated the appearance of some putative fathers

(70.cont'd) children notice and opportunity to be heard in proceedings involving the child's ...adoption, may result ultimately in the vacating of court orders in such proceedings." (Emphasis added) (App. D to brief, p.2-3). For further discussion of voidable status of an adoption order if an unwed father has not been notified, see Barron, "Notice to the Unwed Father", etc., 9 Fam. L.Quart. 527, 529 (1979); also note the "Strange Boundaries" of Stanley..., Virginia Law Review 59:517 (1973).

at adoption hearings to give testimony as to the child's best interests. As this Court has stated "We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal." Stanley v. Illinois, 405 U.S. at 645 fn.9.[71]

It would appear that the only state interest fostered by the notice classifications of Section 111a would be speed and efficiency; however, as this Court stated "But the Constitution recognizes higher values than speed and efficiency." Footnote omitted, Stanley 405 U.S. at 656.

The logical conclusion of these balancing tests is that the statutory scheme of Section 111 and Section 111a

71. Stanley, supra, at 657 n9 contemplated no additional administrative or fiscal burdens or even delay, if unknown putative fathers were notified.

of providing notice and a hearing to putative fathers violates the Due Process Clause of the Fourteenth Amendment.

POINT III - THE GENDER AND NON-GENDER BASED CLASSIFICATIONS SET FORTH IN SECTION 111 AND 111A, WHICH DENIED APPELLANT NOTICE AND THE OPPORTUNITY TO BE HEARD ARE BASED SOLELY ON SEX, AND BEAR NO SUBSTANTIAL RELATIONSHIP TO GOVERNMENTAL OBJECTIVES.

Jonathan Lehr has raised for this Court's scrutiny, two types of classifications which are relevant herein: the first being gender-based, and the second non-gender. At the time of the adoption herein, Section 111 of the Domestic Relations Law provided that all married and divorced parents, as well as all unwed mothers, must be notified of adoption proceedings involving their child. Section 111.1 further provided that no adoption could take place without the con-

sent of these parents.[72]

Unwed putative fathers, however, did not have the right to consent,[73] as their participation in the adoption proceedings was statutorily limited to providing evidence to the court relevant to the best interests of the child (Section 111 a.3).[74] In addition, notification of adoption proceedings was only required to be given to seven classes of putative fathers, and even where such notification was required, notice by publication was not

72. Section 111.2 provides for situations where this consent right may be lost; for example, if abandonment is shown (Section 111.2a). As noted previously, Section 111 was amended to add two classes of putative fathers whose consent is required, but unlike the right to consent given to all other parents which may only be lost or waived, the right to consent is not given to all putative fathers, but just those who can prove that they possess the various criteria set forth in Section 111.1d,e (J.S. App. F 2-4).

73. id.

74. After the amendment, unwed fathers who received notice and were found not to have the right to consent were also limited to giving testimony as to best interests. Thus, both before and after the amendment, all unwed fathers were not entitled to a hearing on their fitness, held (continued)

mandated where the putative father's whereabouts was unknown.[75] In addition to the foregoing gender-based discriminations, Section 111a also makes a distinction between those unwed fathers entitled to notice versus those, as Appellant herein, who do not fit within any of the categories.[76]

STANDARDS TO BE APPLIED. In reviewing gender-based classifications, the Court has indicated that there is need for "Stricter-than-normal standards."[77] As Chief Justice Burger stated for a unanimous court in Reed, supra, in reviewing

(74. cont'd) requisite in Stanley v. Illinois, supra, and Quilloin v. Walcott, supra.

75. Section 111.4 permits a court to dispense with notice by publication to a putative father who is listed in one of the 7 categories of Section 111a.

76. There is a factual question as to whether or not Lehr may have been in one of the categories. Lehr claims that Lorraine, the natural mother, had applied for welfare benefits and had named him as the father in her application (A-26,27). This is not refuted by Lorraine. If Lehr was named, he would have been entitled to notice pursuant to Section 111a.1f.

77. next page

a gender based classification, at page 76:

> "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation so that all persons similarly circumstanced shall be treated alike. Royster Guano Co. v. Virginia, 253 U.S. 412,415(1920)."

Thus, what has emerged in the area of gender-based discriminations has been the so-called "intermediate" test of Craig v. Boren, 429 U.S. at 197 : "Classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[78]

77. More than the "minimal scrutiny" of the challenged legislation to determine whether a rational relationship between the statute and a legitimate state interest existed. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

78. See also Mississippi Univ. for Women v. Hogan 50 U.S.L.W. 5068, 5070 (7/ 1/82) (state must show an "exceedingly persuasive justification" for the classification). See also Kirchberg v. Feenstia, 450 U.S. 455, 461, (1981).

In applying this heightened scrutiny test to gender-based classifications, the Court has set forth various criteria which it has used to either uphold or strike such classifications. Under this test a classification based on overbroad generalizations or old notions unrelated to the difference between men and women have been held unconstitutional.[79] Administrative convenience was also not sufficient to support gender-based classifications.[80]

When the Court, however, was faced with sex discrimination against putative fathers, additional factors became apparently quite important to the Court. Where

79. Reed v. Reed, 404 U.S. 71(1971); Stanton v. Stanton, 421 U.S. p.7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U. S. 190 (1976); Orr v. Orr, 440 U.S. 268 (1979); Mississippi Univ. for Women v. Hogan, 50U.S.L.W. 5068 (7/1 /82). These later three cases were particularly important since they found statutes unconstitutional in cases for reverse discrimination, i.e., where men were discriminated against.

80. Stanley v. Illinois, supra; also, Reed v. Reed, supra.

either the child or the putative father is attempting to derive some economic benefit and one of the parties is dead, the Court was concerned with proof of paternity. The Court held that such a concern was constitutionally sufficient for a classification.[81] The question of proof of paternity thus outweighed the fact that other state objectives might be constitutionally unacceptable.[82]

Where all parties are alive, however, as in this case, and the issue is the ongoing relationship between putative father and child, paternity could be pro-

81. See Lalli v. Lalli, 439 U.S. 259 (1978) (Illegitimate child barred from inheriting from putative father). See Parham v. Hughes, 441 U.S. 347 (1979) (Putative father prohibited from suing for wrongful death of illegitimate child).

82. As White,J. points out in writing for the dissent in Parham v. Hughes, 441 U.S. 347, 362 (1979), the assumption by the state that the father will suffer no real loss on a child's death is just a broad gender-based classification having no real basis. This is "procedure by presumption," which Stanley, supra, held to be an improper basis for gender-based discriminations.

ven at the adoption proceeding.[83] Lacking the need for proof of paternity, the Court found the "means" used by the states to achieve the governmental objectives were constitutionally deficient as they were based on irrebuttable presumptions, archaic and over-broad generalizations, and treatment of similarly situated persons in different manners.[84]

GOVERNMENTAL OBJECTIVES IN SECTION 111 AND SECTION 111a. As in all termination of parental rights proceedings, the objective of the State is to promote the general well-being and welfare of the children. Santosky v. Kramer, 102 S.Ct. 1388, 1401. In the case of adoptions of

83. Caban, supra, Stanley, supra, Quilloin, supra.
84. In Stanley v. Illinois, supra, at p. 655, the presumption was that all putative fathers were assumed unfit and therefore weren't given notice of proceedings designed to terminate parental rights; and in Caban, supra, at pp. 389, 394 the presumption was that maternal and paternal roles are invariably different. See also Califano v. Goldfarb, 430 U.S. 199, 211 (1977) and Stanton v. Stanton, 421 U.S.7 15 (1975)

illegitimate children, this state interest has been couched in terms of promoting the adoption of these children. Caban v. Mohammed, 441 U.S. 380 (1979). Undue delay in completing these proceedings as well as finality upon completion of these proceedings is also a state objective.[85.]

Section 111 and Section 111a of the Domestic Relations Law are the means by which the New York Legislature has tried to foster these objectives. The underlying basis for at least one of these statutes, to wit, Section 111, was set forth by the New York Court of Appeals in Matter of Malpica Orsini, 36 N.Y. 2d,568 (1975): "The inferior classification of the father of a child born out of wedlock bears a significant relationship to the recognized purpose which Section 111 of the Domestic Relations Law commendably

85. Stanley v. Illinois, supra, 405 U.S. 645,656

serves" id. at 575. Section 111 thus permitted the adoption of illegitimate children without any notice to the putative father and without requiring his consent while giving notice and consent to all parents and unwed mothers.[86] This Court in Caban v. Mohammed, 441 U.S. 380, held that Section 111 was not substantially related to the achievement of the State objectives[87] and therefore held those provisions requiring the consent of all parents except unwed fathers violated the Equal Protection Clause.[88] In so doing it laid to rest the overbroad generalization that unwed fathers were inherently unfit, and that they would abuse the right

86. As noted previously Section 111.3 gave the Court discretion to give notice to parents whose consent was not required.

87. Citing Reed v. Reed, supra, and Craig v. Boren, supra.

88. Caban, supra, did not deal with the question of notice since the putative father was given the "...procedural due process held to be requisite in Stanley" id. 385, fn.3.

to consent, Caban at 391. This Court recognized that there were unwed fathers whose parental rights ought not be terminated without a finding of abandonment or some other disqualification which a state could impose.[89.]

Section 111a, ostensibly enacted to codify the minimum requirements of this Court's decision in Stanley v. Illinois, supra,[90.] suffers from the same constitutional infirmities as Section 111. It makes the unwed father a "second class citizen" with respect to notice of and participation in adoption proceedings based upon the sole criterion that he is an unwed fathers. The categories of fathers who receive notice bears no rela-

89. The amended provisions of Section 111, Section 111d,e,appear to suffer the same constitutional infirmities in being too restrictive against putative fathers. Already one New York court has declared Section 111e (J.S. App.F-4) unconstitutional; see Matter of Female F.D.105 Misc. 2d 866 (1980).

90. See Sen. Pisani's letter (App. D p.2 attached to brief).

tion to the state's objectives of promoting the child's welfare by obtaining finality in adoptions as quickly as possible.[91] The putative fathers who are not notified, such as Mr. Lehr, have not been found unfit, nor is notification to them going to delay the adoption process. The categories of Section 111a are therefore based on speed and efficiency, held invalid under Stanley, supra. The State has made the irrebuttable presumption that all putative fathers who do not fit within the seven categories, are unqualified even to give testimony as to the child's best interests, let alone to give evidence as to their fitness. The State has thus substituted procedure by presumption for individualized hearings on each putative father's status held requisite in

91. See Point IIp.59 of this brief where it is shown that the risk of an erroneous adoption is enhanced when known and concerned putative fathers may not receive notice of adoption proceedings.

Stanley, supra.

Section 111a does not only discriminate against unwed fathers with respect to notice, but also with respect to participation in the adoption process. Section 111a.3 limits a putative father's appearance to giving testimony as to the child's best interest. This section was intended to "...short circuit any attempt by an unwed father to misconstrue the right to notice for the rights to veto an adoption." Matter of Patti Ann N, 104 Misc. 2d 263 (1980). Therefore, an unwed father, who is notified of an adoption proceeding, may only prevent an adoption by showing that it is not in the child's best interests. For all other parents, including unwed mothers, absent their consent, there must be a finding of statutory abandonment, unfitness or neglect. There is no basis for this distinction until the putative father has been shown to

have disqualified himself from participating in the adoption process.

Before any hearing is held to determine what his relationship was with Jessica, Jonathan Lehr is similarly situated to all putative fathers, as well as to all other parents, including the unwed mother. After an individualized hearing, it may be shown that Mr. Lehr or other putative fathers may not be similarly situated to other parents, including unwed mothers.[92] Mr. Lehr, however, has been given inferior procedural due process rights, as well as substantive due process rights without such a finding. Using sex as a basis for granting different procedural and substantive due process rights is not acceptable under

92. In Quilloin, supra, at 253, 254, the Court found, after the "individualized" hearing, that the putative father was not in the same position as married or divorced fathers because of his failure to create a substantial relationship with the child.

93.

the Equal Protection Clause. As the Court held in Stanley, supra, at page 658, n.10:

> "Predicating a finding of constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the basis that a state has accorded bedrock procedural rights to some but not to all similarly situated is not contradictory to our holding in Picard v. Connor, 404 U.S. 270 (1971)."

Thus, the gender-based classifications contained in Section 111 and Section 111a "...premised on overbroad generalizations that could not be tolerated under the Constitution," Schlesinger v. Ballard, 419 U.S. 498, 507 (1974) (Justice Stewart). See also Reed v. Reed, supra, and Frontiero v. Richardson, supra.

The classifications complained of

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93. Where distinctions created by the statutory classifications are based exclusively on biological differences between men and women, rather than the differences in their situations, there is an invidious discrimination. Parham v. Hughes 441 U.S. 347, 354 (1979).

here, both gender and non-gender, which have excluded Mr. Lehr from any participation whatsoever in the adoption proceedings of Jessica, are not substantial or even rationally related to any of the stated governmental purposes, other than to further subordinate the rights of a putative father.

The State of New York clearly has not sufficiently tailored Section 111 and Section 111a to meet its legislative objectives; it has instead managed to "... sweep unnecessarily broadly reaching far beyond the evil sought to be dealt with," (Griswold v. Conn., 381 U.S. 479, 498, (1965) (Douglas, J.). In an effort to "streamline" its adoption procedure, the State of New York has created objective standards in an area which defy the use of such standards. Relationships, fitness, and best interests cannot be measured by the filing of papers. The State regis-

tered no gain whatsoever in denying Jonathan Lehr his day in Court.

POINT IV - THE RULE OF LAW ANNUNCIATED BY THIS COURT IN CABAN v. MOHAMMED, 441 U.S. 380 (1979), IS APPLICABLE TO THIS CASE.

On April 24, 1979, Caban v. Mohammed, 441 U.S. 380 (1979), was decided, in which this Court held that the New York Domestic Relations Law, Section 111, violated the Equal Protection Clause of the Fourteenth Amendment because it made an "...undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue..."[94]. Such an undifferentiated distinction was found in the New York statutory scheme, which prohibited all unwed fathers from consenting to the adoption of their child while giving that right to all other parents. The decision in Caban,

94. Caban v. Mohammed, supra, at 393.

supra, came 48 days after the Family Court of Ulster County signed the final order of adoption.[95] Also pending at the time of the Caban, supra, decision was the motion by the Appellees to dismiss Lehr's paternity petition.[96]

Jonathan Lehr claims that the Caban decision should be applied to the facts and circumstances of this case.[97]

The New York Court of Appeals, in its decision, held that Caban, supra, should not be retroactively applied to this case

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95. The order was signed March 7, 1979. (A-66) It should be noted, however, that had the Family Court Judge not signed the order on that date, as he implicitly indicated that he would not do by signing the order to show cause for change of venue (see ch. 9, Cooke's dissent J.S.App. A-13), then, quite conceivably, the adoption proceedings may still have been pending when Caban, supra, was decided. If the change of venue motion had been granted, then the adoption proceedings would have been heard with the paternity proceedings.

96. This motion was returnable May 1, 1979, and decided June 20, 1979 (A-227). On June 22, 1979, Lehr brought on his application to vacate the order of adoption which is the basis of this appeal. (A-4).

97. The Family Court decision herein was made on

and, in so doing, relied upon the reasoning[98] used by the dissent in Caban,, supra. Appellant contends that such reasoning is incorrect and, in any case, not applicable to the peculiar facts and circumstances of this case.

The United States Constitution neither prohibits nor requires the retrospective application of decisional law. See Linkletter v. Walker, 381 U.S. 618, 629 (1965). The presumption in civil cases is that decisional law is retrospective[99] unless the party asserting its non-retroactivity is able to satisfy the tests annunciated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971):

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to

November 26, 1979, more than 8 months after Caban supra, was decided.

98. The dissent feared that the retrospective application of Caban would leave open to attack all completed adoption proceedings.

99. See Firestone Tire and Rubber Co. v. Risjord, 101 S.Ct. 669, 676 (1981), where the Court

> be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied...or by deciding an issue of first impression whose resolution was not clearly foreshadowed.... Second, it has been stressed that 'we must...weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'... Finally, we have weighed the inequity imposed by retroactive application, for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Chevron, supra, at 106, 107.[100]

Applying the Chevron, supra, standards to the instant case confirms the propriety of retrospectively applying Caban, supra, to the facts and circumstances of this

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indicated: "...by definition, a jurisdictional ruling may never be made prospective only;" Kremer v. Chemical Const. Corp., 623 F.2d 786, 788 (1980).

100. None of the lower court decisions herein analyzed the three criteria in Chevron, supra, thereby wrongfully assuming that all decisions should have prospective effect only.

case. The first Chevron requirement for non-retroactive application is that a new precedent be established by the ruling in question. Caban, supra, did not establish a new principle of law,[101] nor constitute a sharp break in the line of earlier authority,[102] nor a sharp break in the web of law.[103] Nor can the decision be deemed to be an overruling of clear past precedent on which litigants may have relied. See Chevron, supra, at 106, 107. As noted in Point IV of this brief, gender-based discrimination, as is present in this case, warranted a heightened standard of review even prior to Caban, supra.[104] Classifications based purely on overbroad generalizations or irrebuttable presumptions were

101. Chevron, supra, at 106.

102. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 499 (1968).

103. Milton v. Wainright, 407 U.S. 371, 381 n.2 (1972).

104. Craig v. Boren, supra; Reed v. Reed, supra.

violative of the Equal Protection Clause.[105] Section 111 of the New York Domestic Relations Law, as the Court stated in, Caban, supra, was based upon these invalid premises.[106] Caban, therefore, was foreshadowed by these decisions. The rights of putative fathers were being expanded, not curtailed.[107]

Turning to the second Chevron criterion neither the Appellees nor the courts below have shown that the purposes of Caban, supra, would be retarded by retroactive application or furthered by prospective application only. Since the retrospective application would be applied only to cases with facts similar to those in the instant case, it would appear that

105. Stanley v. Illinois, supra, at 655 (a blanket exclusion is not acceptable where more precise means are available.); Carrington v. Rash 380 U.S. 89 (1965); Reed v. Reed, supra; Orr v. Orr, supra; Califano v. Goldfarb, 430 U.S. 199, 211 (1977); Stanton v. Stanton, 421 U.S. 714, 715 (1975).

106. Caban, supra, at 394.

107. Stanley v. Illinois, supra; Quilloin v. Walcott, supra.

retrospective application would further the Caban ruling. The principle annunciated by Caban was to prevent concerned and caring putative fathers from having their parental rights terminated based solely upon their sex and not upon their qualifications. Indeed, if the retrospective application of Caban would prevent such a termination of parental rights, then the rule would be fostered.

The third Chevron criterion of balancing the equities, is the one most heavily relied upon by the dissenters in Caban and in the New York Court of Appeals decision. Their fear, however, of thousands of completed adoption proceedings being re-opened is not realistic. The facts of this case are particular and unique. Jonathan Lehr was a known and ascertainable father who had taken affirmative steps to secure a relationship with Jessica M. With knowledge of this, the lower court

proceeded to conduct the adoption proceedings in "secrecy" and then misled Lehr into believing that he would be able to be heard in the adoption proceedings.[108] The retrospective application of Caban will merely give Lehr his day in court,[109] and there is no reason to believe, as the Court stated in Caban, supra, 391, 392, that he would use his consent right to arbitrarily veto the adoption. In fact, Lehr may be found to have lost his right of consent if it is found that he has abandoned the child.[110]

It further appears unlikely that fathers in Lehr's position,[111] who have not

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108. By signing the change of venue motion. See Footnote 95, supra, in this Point.

109. In Chevron, supra, p. 108, the Court applied the non-retroactivity doctrine in order to preserve for appellant his right to a day in court.

110. Section 111.2(a) (J.S.App. F-5). Further, Lehr may not meet the new criteria for those putative fathers who have the right to consent pursuant to the amended provisions of Section 111, to wit, Section 111.1(d)(e) (J.S.App. F-2-4).

111. It is submitted that there are not many putative fathers in Lehr's position.

already made an effort to open adoption proceedings which terminated their parental rights, will now do so if Caban is applied retrospectively in this case. These fathers in most, if not all, cases have evidenced an intent to abandon their children and would, therefore, be statutorily disqualified from exercising their consent rights, even if they initially had such rights. The application of Caban in the instant case would not be significantly different from the application of the Stanley, supra, decision to Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972).[12] On remand the Wisconsin Supreme

[12]. In this case the putative father was not notified or given the opportunity to be heard in the proceedings which terminated his parental rights. They were terminated, and an adoption took place. Not unlike Lehr, the putative father brought on a separate proceeding to vacate the order which was denied. A habeas corpus proceeding for custody of the child was then brought in which the putative father raised the constitutional issues of notice and the opportunity to be heard. The Wisconsin Supreme Court denied the writ. On appeal, this Court vacated and remanded Rothstein v. Lutheran Social Services of Wisc.,

Court stated:

> "We do not hold that Stanley or the reversal of our decision in Rothstein is to be applied retroactively and undercut the basis of other prior adoption proceedings. In this case, the petitioner made his claim known prior to the birth of the child, was kept from knowledge of its birth and its whereabouts, made an application to the court to assert his rights as soon as he learned of the termination-of-parental-rights proceeding, and was denied a hearing. There are few cases pending with facts raising such an issue. Stanley applied retroactively only to these facts and to any pending cases where the natural father has been denied rights which he asserted as the petitioner did in this case."

State ex rel Lewis v. Lutheran Social Services of Wisc., 207 N.W.2d 826, 829 (1973).[113]

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405 U.S., 1051 (1972), for further consideration in light of Stanley v. Illinois, 405 U.S. 645 (1972). On remand the Wisconsin Supreme Court recognized that Stanley was being given retroactive application by this Court to an already completed termination of parental rights proceeding and adoption. State ex rel Lewis v. Lutheran Soc. Services, 207 N.W.2d 826 (1973). See also Vanderlaan v. Vanderlaan, 405 U.S. 1051 (1972), which was also remanded in light of Stanley, supra.

113. In State ex rel Lewis, supra, at 831, the

The retrospective application of Caban, supra, to this case is, of course, not dispositive of the other points raised by Lehr. Lehr has shown his entitlement to notice and a hearing. He has shown that, even without Caban, supra, his parental rights were unconstitutionally terminated without a hearing as to his fitness. Caban adds the right to consent to the other rights of which he was unconstitutionally deprived.[114]

Wisconsin Supreme Court opened the order which had terminated the putative father's rights and gave the father a hearing on the issue of the termination of parental rights. After the hearing the court found that the putative father had abandoned the child and ordered the termination of his parental rights. See State ex rel Lewis v. Rothstein, 227 N.W.2d 643 (1975).

114. Even without the right of consent, Lehr, if given the opportunity to appear, could have prevented the adoption by showing his fitness and/or that the adoption would not be in Jessica's best interests.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals was violative of Appellant's rights of Due Process and Equal Protection under the Fourteenth Amendment of the Constitution of the United States and should be reversed.

Respectfully submitted,

DAVID J. FREEMAN
Attorney for Appellant
175 Main Street
White Plains, N.Y. 10601
(914) 949-3311

On the Brief
Evelyn Petrone, Esq.

APPENDIX A--STATE STATUTES INVOLVED AS AMENDED LAWS 1980; CHAPTER 575 EFFECTIVE JULY 27, 1980.

DOMESTIC RELATIONS LAW

Section 111. Whose consent required as amended by Chapter 575, L. 1980.*

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

*Matter underscored is new; matter in brackets is old law to be omitted. The Statute without underscored or bracketted changes is the law as it stood on March 7, 1979. The statute with the changes is the present law.

(d) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or

authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained

substantial and continuous contact with the child for the purpose of this subdivision.

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and rassonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

(f) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having

custody of the child:

(a) who evinces an intent to forego his or her pa-ental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of seciton three hundred eighty-four of the social services law, or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental

retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law; or

(f) who has executed an instrument, which shall be irrevocable, denying the paternity of the child or consenting to the other parent's surrender of the child or consent to the child's adoption, such instrument having been executed after conception and acknowledged or proved in the manner required to permit the recording of a deed.

3. Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c)* of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct

* Sic. Should be (b), (c), (d) and (e).

that the consent specified in paragraph (d)** of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consents cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to

** Sic. Should be (f).

the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

Section 117 of the Domestic Relations Law In the State of New York

1. After the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession, except as hereinafter stated.

The rights of an adoptive child to inheritance and succession from and through his natural parents shall terminate upon the making of the order of adoption except as hereinafter provided.

The adoptive parents or parent and the adoptive child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be subject to all the duties of that relation including the rights of inherit-

ance from and through each other and the natural and adopted kindred of the adoptive parents or parent.

When a natural or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepfather or stepmother may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child to inherit from and through each other and the natural and adopted kindred of such consenting spouse.

The right of inheritance of an adoptive child extends to the distributees of such child and such distributees shall be the same as if he were the natural child of the adoptive parent.

Adoptive children and natural children shall have all the rights of fraternal relationship including the right of inheritance from each other. Such right of inheritance extends to the distributees of such adoptive children and natural children and such distributees shall be the same as if each such child were the natural child of the adoptive parents.

The consent of the parent of a child to the adoption of such child by his or her spouse shall operate to vest in the adopting spouse only the rights as distributee of a natural parent and shall leave otherwise unaffected the rights as distributee of the consenting spouse.

2. This section shall apply only to the intestate descent and distribution of real and personal property and shall not affect the right of any child to

distribution of property under the will of his natural parents or their natural or adopted kindred whether such natural parent or kindred shall have died heretofore or shall die hereafter or under any inter vivos instrument heretofore or hereafter executed by such natural parent or his or her kindred.

3. The provisions of law affected by the provisions of this section in force prior to March first, nineteen hundred sixty-four shall apply to the estates or wills of persons dying prior thereto and to inter vivos instruments theretofore executed which on said date were not subject to grantor's power to revoke or amend.

Appendix C . . . . . EXCERPTS FROM APPELLANT'S COURT OF APPEALS BRIEF

P.55

Section 111a is one of those statutes which the Stanley court characterizes as a statute which is based upon "speed and efficiency" rather than one designed to safeguard the procedural due process rights of Appellant and persons in his position. What the State of New York has done with Section 111a is to create an arbitrary narrow classification of unwed fathers entitled to notice with no real focus on the critical question of who has a substantial interest in the child. Where there is no formal acknowledgement as required by Section 111a, parental rights may be terminated despite the fact the unwed father is ascertainable and has shown

a cognizable interest in the child.[13] This is precisely the case here. It is clear that for Section 111a to be within the confines of Stanley, any enumeration of unwed fathers entitled to notice must be coupled with a clause providing notice to any person who the court has reason to believe might be the father. Indeed we have here the very situation where the court received prior notice of an acknowledgement by Appellant of paternity in the form of the paternity petition. This is more than Section 111a requires, to wit, filing of a notice of intent to claim paternity. The latter is constructive notice, the former actual notice. The Appellate Division, however,

13. It should be noted here that in Stanley, Peter Stanley did not formally acknowledge paternity until after the institution of dependency proceedings. In fact, the court mentioned the burden of the unwed father to prove during the adoption proceedings his paternity.

did not find any constitutional infirmity with Section 111a (A-178), holding that Section 111a met all the requirements of Stanley, supra. The analysis given by the Appellate Division is defective. First of all, the Appellate Division confuses procedural due process with substantive due process. The Appellate Division states that Stanley stands for the proposition that a state could not be consistent with due process by "presuming" an unwed father to be unfit. This is partially correct; however, what about the first and most significant concept of due process, to wit, Notice, and the opportunity to be heard! Can the Appellate Division realistically argue that Section 111a is all encompassing. Under what possible theory can it be argued that an unwed father who has filed a notice of intent to claim paternity be

more entitled to notice than an unwed father who has actually acknowledged paternity and is literally standing at the front door of the courthouse, begging to be heard! Indeed, the Appellate Division has given Stanley an interpretation which defies logic, and which more importantly is inconsistent with procedural due process for which Stanley stands.

Clearly Section 111a is arbitrary and the priority treatment given to certain unwed fathers bears no relation to the rights sought to be protected, nor the intent of the statute. As Judge Mikoll in her dissent indicated (A-179)

> "Appellant herein was a readibly identifiable person under the 'spirit and intent' of Section 111a."

The Appellant herein has clearly exhibited sufficient interest so as to

entitle him to notice.

Substantive Due Process.

It follows clearly from Stanley, supra, that once an unwed father (either acknowledged or unacknowledged) has been afforded his constitutional rights to notice and an opportunity to be heard, he must also be afforded his right to consent to the adoption, assuming he is a fit parent. The parental righqs of an unwed father cannot be terminated without proof that the father was unfit. Stanley requires that the parental interest of the unwed father be recognized and not terminated unless unfitness is shown. Merely because there is an unwed father does not necessarily mean he is unfit. While it is easy for a legislature to presume that an unwed father is unfit, this cannot stand the constitutional challenge. As the court said in Stanley,

at page 656:

> "But the Constitution recognizes higher values than speed and efficiency."
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

The Appellant herein has clearly been denied his substantive due process. By failing to notify him and give him an opportunity to be heard, the Family Court has precluded his right to show that he is fit. Substantive due process establishes a minimum threshold of standard for determination of parental rights, to wit, parental unfitness (see Matter of Corey L. v. Martin L., 45 N.Y. 2d 383.

Appellant was denied this.

Section 111a.3 provides that even had Appellant received notice, he could only testify as to the best interests of the child. This is clearly and patently contrary to Stanley's requirement that a hearing be held as to fitness before an adoption be granted. As the court stated in Matter of Benjamin, 93 Misc. 2d 1084 at 1056:

> "An unwed father, it has been held, is entitled to a hearing on his fitness as a parent before custody of his children can be taken from him" (Stanley v. Ill. 405 U.S. 645).

Indeed, if at such a hearing the Appellant herein can prove fitness, then his consent would be required before an adoption could take place. As the Appellate Division, 4th Department, said in In Re Mitchell, 421 N.Y.S. 2d, 443 (1979):

> "Where the issue is the right of a natural parent to custody of his child, it is established that a parent cannot be replaced because someone else could do a better job of raising the child; rather, only when "extraordinary circumstances" such as abandonment, unfitness or persistent neglect are found, 'the court must then make the disposition that it is in the best interest of the child." (Matter of Bennet v. Jeffreys, supra, 40 N.Y. 2d at 548, 387 N.Y.S. 2d at 826, 356 N.E. 2d at 283; Raysor v. Gabbey, supra).

The Appellant herein has clearly been denied his substantive due process rights.

Once again, the Appellate Division completely ignores this argument. While the Appellate Division recognizes the right to substantive due process (i.e., the right to prove fitness), it does not comprehend how Section 111a clearly deprives Appellant of this right. How can Appellant prove he is fit if he is not given notice and his day in court.

Further, Section 111a limits an unwed father's role in an adoption proceeding to giving testimony only as to the child's best interest. Thus, even if the unwed father was fit, he would still be unable to prevent the adoption. This is clearly and patently contrary to Stanley. Section 111a not only presumes that all unwed fathers are unfit, but makes this presumption unrebuttable!

Equal Protection

In addition to the denial to the Appellant of his due process rights, the Appellant was further denied equal protection of the law as is guaranteed to him by the Fourteenth Amendment. By applying the provisions of Section 111 and Section 111a of the Domestic Relations Law in this case, the Appellant herein was indiscriminately and arbitrarily treated differently than all other

parents of children, both borh in wedlock and out of wedlock.

In determining what a state may do by way of classifications, the U. S. Supreme Court has held that

> "... a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

See Reed v. Reed, 404 U.S. 71, 75-76 (1971)

> "A state may not draw a line which constitutes an invidious discrimination against a particular class."

See Skinner v. Oklahoma, 316 U.S. 535, 541-542. This rule, however, becomes much more stringent when a fundamental right is involved. As Justice Powell said in writing for the majority in Weber v. Aetna, 406 U.S. 164 (1972):

> "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach

> sensitive and fundamental personal rights this court exercises a stricter scrutiny". (cases cited)

Clearly, Stanley and the other cases cited herein place Appellant's parental rights in the category of "fundamental personal rights".

When, however, a statute such as Section 111 and Section 111a of the Domestic Relations Law of the State of New York makes a gender based classification, the test becomes more critical as to whether or not a State objective necessitates such classification. As the U.S. Supreme Court stated in Craig v. Boren, 429 U.S. 190, 197 (1976):

> "To withstand a constitutional challenge previous cases establish that classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." (emphasis added)

But, it has been sufficiently pointed out that such governmental objectives must

not be based upon "archaic and over-broad generalizations" (see Califano v. Goldfard, 430 U.S. 199 (1977), or "old notions", (see Stanton v. Stanton, 421 U.S. 7).

If we look at how the New York statutes in question treat the Appellant, it can clearly be seen that he has been denied equal protection. The following classifications are arbitrary:

(1) Section 111a is a statute which relates only to fathers of children born out of wedlock (such as Appellant herein), and treats them differently than all other parents, including unwed mothers of children born out of wedlock. All mothers of children born out of wedlock must receive notice of adoption proceedings while only certain unwed fathers receive notice. In addition, the type and manner of notice given to an unwed father is different than afforded to all other parents, including unwed mothers.

(2) Section 111a discriminates between unwed fathers, to wit, those who fit into the categories against those who do not. There is no reasonable basis, especially where a readily identifiable father is known to the court, as is the case here.

(3) Section 111a also treats said unmarried fathers differently in that their participation in adoption proceedings is limited to submitting evidence as to the child's best interests while all other parents, including unwed mothers of children born out of wedlock, participate in adoption proceedings to give their consent.[14].

(4) Section 111 of the Domestic Relations Law excludes unwed fathers of children born out of wedlock from consenting to the adoption while consent

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14. As has been heretofore shown, this violates the due process clause since an unmarried father is entitled to a hearing as to his fitness. See Stanley v. Ill. supra. In view of Caban v. Mohammed, supra, this is also violation of equal protection since an unwed father now must give his consent just as an unwed mother.

> is required of all other parents, including unwed mothers of children born out of wedlock.[15]

What are the reasons for such classifications? Why is the unwed father of a child born out of wedlock treated so differently than all other parents, including an unwed mother of a child born out of wedlock? The reasons stem from the "archaic" and irrational belief that the maternal and paternal interests in a child are different. That unwed fathers are inherently unfit, that unwed fathers all abandon children borh out of wedlock; that an unwed father is incapable of having a relationship with the child; that all unwed fathers are unknown and not ascertainable. The list can go on

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15. It should be noted that Section 111 was declared unconstitutional by the U. S. Supreme Court in Caban v. Mohammed, supra.

and on but all reasons for the classification relate to the presumed unfitness of the unwed father, and the presumed fitness of all other parents, in all cases of adoption. That presumption is no longer tenable and has not been since Stanley, supra.

. . . .

The effect of the application of the New York Statutes in this case (Section 111 and Section 111a of the DRL) has been to deny the Appellant of his due process rights and equal protection rights. He has been arbitrarily treated differently than other parents for no compelling purpose other than the fact that he is a male, and/or that he failed to take a selected few affirmative steps as prescribed by statute. Neither has any relationship to a State interest

other than the State interest of speed and efficiency. But as noted in Stanley, supra, the Constitution recognizes higher values than speed and efficiency.

The lower court, in its decision, attempts to uphold the constitutionality of Section 111A by referring extensively to the legislative history (A-25-30). What was neeced, however, was an analysis os the constitutional rights in question and whether they have been preserved or denied. Obviously, the Legislature believed it was enacting a constitutional statute in Section 111a. It also believed Section 111 was constitutional. Neither the reasoning of the State Legislature nor the court, however, can withstand the test of due process and equal protection.

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THE TEMPORARY STATE COMMISSION
ON CHILD WELFARE Room 203
State Office
Building
270 Broadway
New York, N.Y. 10007
212-488-4843

Senator JOSEPH R. PISANI
Chairman

July 7, 1976

Hon. Judah Gribetz
Counsel to the Governor
Executive Chamber
The Capitol
Albany, New York 12224

RE: S.10484
(Ten Day Bill)

Dear Mr. Gribetz:

My bill, S.10484, will shortly be before the Governor for Executive action. In response to your request for comments and recommendations concerning this bill, which is multi-sponsored by Senators Dunne and Halperin and which was introduced in the Assembly by Assemblymen Blumenthal and Gottfried, I am enclosing herewith a copy of a memorandum in support thereof.

The bill, prepared by the staff of the Temporary State Commission on Child Welfare of which I am Chairman reflects many months of study by the Commission pursuant to a grant therefor received by the Commission from the Edna McConnell Clark Foundation; it also addresses itself to a substantial barrier to the freeing of children for adoption as identified by the Commission in its study on that subject performed for the State Department of Social Services under a Title IV-B Research and Demonstration Project Grant.

As the enclosed memorandum indicates, the bill is responsive to the U.S. Supreme Court decision in Stanley v. Illinois, 405 U.S. 645. In the aftermath of that decision, states and public and voluntary agencies have either overreacted or underreacted thereto, in the absence of clear statutory guidelines. Overreaction has often been noted in agency or administrative practices requiring extensive searches for unidentified or unknown putative fathers which have resulted in tragic failures to free children for adoption and inability to plan for the future of many children. Needless, often futile and protracted searches have also placed heavy staff and financial burdens on both public and voluntary agencies which can ill-afford such burdens. Overreaction has also been characterized, in some states, by the equation of the rights of fathers of inwedlock and out-of-wedlock children (for example, by requiring the latter's consent to the child's adoption) - a legal proposition not supported by the Stanley decision and clearly nullified by the Supreme Court's dismissal (96 S. Ct. 765), for want of a substantial federal question, of the appeal of the New York Court of Appeals decision in In re Malpica-Orsini, 36 N.Y. 2d 568.

On the other hand underreaction to Stanley, by failing to provide concerned, adjudicated or other readily identifiable fathers of out-of-wedlock children notice and opportunity to be heard in proceedings

involving the child's custody, guardianship or adoption, may result ultimately in the vacating of court orders in such proceedings.

This bill is intended to codify the minimum protections for the putative father which Stanley would require. In so doing it reflects policy decisions to a) codify constitutional requirements; b) achieve finality, as early as possible in a child's life, in the establishment of the rights, interests and obligations of all parties, and, conversely, to eliminate extant uncertainty, as soon as possible in relation to these rights, interests and duties; c) to facilitate planning for the future of the child and permanence of his status; and d) through the foregoing, to promote the best interests of children. These general policies and also many of the specific procedures, protections and other provisions of the bill were developed at a meeting I convened in Albany on March 31. Present at that meeting, in addition to Commission staff, were representatives of the State Department of Social Services and Health, the Office of Court Administration, the Law Revision Commission, staff of Assemblymen Blumenthal and Gottfried, the Chief Counsel of the New York City Human Resources Administration and the Governor's Program Office.

The measure establishes a putative father registry in the State Department of

Social Services which would record the names and addresses of certain putative fathers. Operation of the registry would be subject to seventy-five percent federal reimbursement under Title IV-D of the U.S. Social Security Act. State and local government costs of operation which according to the State Department of Social Services are expected to be minimal would be offset by savings generated by (1) reduction in casework time currently required to exercise "diligent searches" to locate and notify out-of-wedlock fathers of child custody proceedings; (2) reduced costs of notice (by registered or certified mail) under the bill rather than the current more costly method of notice by publication; and ultimately (3) reduction in public costs of foster care as appropriate children are more expeditiously freed and placed for adoption.

I am aware that the New York State Catholic Conference and the Association of the Bar of the City of New York have expressed opposition to various provisions of the bill, as has the New York State Council of Voluntary Child Care Agencies which otherwise supports the legislation. In rebuttal, I would offer the following observations:

(1) The Catholic Welfare Conference states (in correspondence from Catholic Charities of the Archdiocese of

New York) that the bill fails to give primary emphasis to the best interests of the child. On the contrary, the bill states that the sole purpose of the notice requirement is to afford the father an opportunity to present evidence bearing on the child's best interests. Furthermore, it would not be in the child's best interests to delay settlement of the rights of the father and other parties, or to risk subsequent reversal or vacating of judicial decrees affecting his custody, guardianship or adoption.

(2) The bill has been criticized for its "failure" to assure confidentiality to the mother and to assure that the father will not be involved in future planning for the child. This criticism manifests misunderstanding of the Stanley decision which precludes such assurances and requires involvement of the father to the extent of his constitutional right to notice and an opportunity to be heard.

(3) Catholic Charities claims that notice to the father of the Sec.358-a (Social Services Law) proceeding would impede agency planning with mothers. On the contrary, it would settle the father's rights at a very early stage and thereby facilitate planning for the child.

(4) It has been argued that the

bill is unconstitutional in failing to provide for notice to the father in each and every proceeding affecting the child where notice and opportunity to be heard had previously been given. Stanley, in the opinion of myself and others, requires only that the father have "his day in court" which term does not require an appearance in each and every proceeding affecting a child's custody. The statutory notice provided by the bill fully informs the father of the effect of his failure to appear. I would also emphasize that relitigation of the issues in each and every proceeding involving the child (Sec.358-a, approval of surrender, termination of parental rights, adoption) would create an unbearable restraint on the ability to plan for the child and would seriously burden the entire agency adoption system in this State.

(5) The bill has been criticized for failing to require consents to adoption from fathers of out-of-wedlock children, who have custody of the child. This requirement is present law, as contained in Domestic Relations Law, Sec.111, subdivision four. This section requires consent to adoption of "any person or authorized agency having lawful custody of the adoptive child"; this includes the father of the out-of-wedlock child who has legal custody. I should emphasize that, at the meeting described

above, it was decided that considerations relating to extension of the right to consent or to withhold consent to adoptions were viewed as a completely separate issue not raised by Stanley and held to be unnecessary as a constitutional right in Malpica-Orsini. Accordingly, such extension is not effected by this bill, and it is a separable public policy issue which can be considered in the future.

(6) The Association of the Bar of the City of New York has urged expansion of the notice requirements to include fathers who have "acknowledged" paternity and "filed" such acknowledgements (in come unspecified place), persons "known" by the mother to be the father, persons holding themselves out to be fathers, and men "voluntarily supporting the child". This recommendation ignores the need for a measure of finality in completed adoptions and fails to recognize that fathers included in these "categories" are not readily identifiable. Such expansion of the notice requirements would therefore create a constant danger of having failed to give notice resulting thereafter in the reopening of consummated adoptions. The recommendation of the Bar Association is also impractical in that it would require attorneys for adoptive parents to search 62 county clerk's offices for "filed acknowledgments" and would require affidavits by the mother negating

the existence of such men ("known; holding themselves out", "supporting") and would raise questions as to whether such affidavits would be binding on an unserved father. In any event, if these fathers are truly concerned, the bill affords them the remedy of filing a notice of intent to claim paternity.

(7) The Association of the Bar also criticizes the provisions of the bill which require a father, who filed with the putative father registry a notice of intent to claim paternity, to keep a current address on file with the registry. It should be noted that such father has elected not to avail himself of his right (established by the bill) to initiate a paternity proceeding, but, rather, has chosen the less involved procedure of filing a "notice of intent" which will also protect his right to notice of subsequent proceedings affecting the child. It is not unreasonable to expect this man to manifest a modicum of continuing interest and concern by maintaining a current address on file. Such a requirement is patently constitutional and the Association of the Bar does not appear to contend otherwise.

(8) It has been urged that the provision for ten days' notice is inadequate and that twenty or thirty days should be provided. I would observe that a ten days' notice provision is not without precedent, that it affords ample

opportunity has not been afforded to obtain counsel, the court, under current law, may and usually does grant an adjournment for that purpose. In any event, if circumstances demonstrate that ten days is, in fact, inadequate and works hardship upon fathers receiving notice, I will be willing to introduce ameliatory legislation at an early point in the next legislative session.

Finally, I would call to your attention the fact that the bill refers in several places to Section 384-b of the Social Services Law. This section, which contains new, unified provisions for proceedings to terminate parental rights, would be added to the law by S.8850-A which is now or will soon be before the Governor for Executive action. S.8850-A contains the statutory recommendations of the Temporary State Commission on Child Welfare resulting from its Title IV-B Study referred to above.

In conclusion, this is a significant bill which creates fair, constitutional procedures without unduly burdening the State's child care and agency adoption systems. I would respectfully urge that the Governor give Executive approval to the bill.

Sincerely yours,

Joseph R. Pisani
STATE SENATOR

JRP:dme

Appellee's Brief

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Supreme Court, U.S.
FILED
SEP
ALEXANDER L. STEVAS,
CLERK

No. 81-1756

IN THE

Supreme Court of the United States

October Term, 1981

IN THE MATTER OF THE ADOPTION

OF

JESSICA MARTZ.

JONATHAN LEHR,

Appellant,

v.

LORRAINE ROBERTSON and RICHARD N. ROBERTSON, JR.,

Appellees,

ROBERT ABRAMS, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK (CASE NO. 565)

BRIEF OF APPELLEES ROBERTSON

JAY L. SAMOFF
STREIFER, BARNOVITZ & SAMOFF
9 Main St., U.P.O. Box 3515
Kingston, NY 12401
(914) 331-4977
Attorneys for Appellees Lorraine Robertson and Richard N. Robertson, Jr.

Question Presented.

Did Section 111-a of the New York Domestic Relations Law afford to appellant due process of law and equal protection of the laws within the meaning of the Fourteenth Amendment to the federal Constitution?

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BRIEF OF APPELLEES ROBERTSON.

Statement of the Case.

This is an attempt by a putative father, who at no time had or sought actual or legal custody, to upset a completed adoption by the child's stepfather, and by so doing destroy recognition of an existing family unit.

At issue in this case is the constitutionality of New York's adoption laws with regard to the adequacy of the notice to be given to putative fathers of children born out-of-wedlock.

The chronology of events is as follows:

On November 9, 1976, in White Plains, New York, the infant Jessica was born out-of-wedlock to appellee, Lorraine Robertson, then known as Lorraine Martz (J.A. 94).

The infant's birth certificate does not name a father. Under New York's Public Health Law, §4135, unless the sworn, written consent of both mother and putative father is first obtained, the birth certificate cannot name a father (Appellees' App., p. 1W).

On August 28, 1977, Lorraine Martz married appellee Richard N. Robertson, Jr. (J.A. 81).

On December 21, 1978, Richard N. Robertson, Jr., filed in the Ulster County Family Court a petition to adopt Jessica, and was joined in such application by his wife, Lorraine (J.A. 79-85).

At the time of filing the adoption proceeding, Sections 111 and 111-a of the Domestic Relations Law of the State of New York defined who was entitled to notice of the proceeding (Appellees' App., pp. 1T, 1U).

Appellees have never conceded and no court has ever determined that appellant is Jessica's father (J.A. 149; Appellant's App. A9). Accordingly, appellant's status is merely that of a claimant to paternity, the so-called putative father.

DRL §111-a provides seven categories of putative fathers who were entitled to notice of an adoption proceeding. One universal category mandated that notice be given to anyone and everyone who filed on a Putative Father Registry maintained by the state.

Appellant neglected to so register and did not fall within any of the six other categories. This was conceded by appellant and found by all courts below (J.S. App. A7, B4, C5). Accordingly, no notice was given to appellant.

On January 15, 1979, the adoption hearing was held and completed and the Ulster County Family Court referred the matter to the Ulster County Department of Social Services for its report on the suitability of the adoptive parent and home (Appellant's App. C3).

Totally unbeknownst to the Ulster County Family Court and the appellees, on January 30, 1979, some two weeks after the adoption hearing, appellant filed a paternity proceeding in the Westchester County Family Court. Notice thereof was not served, however, until February 22, 1979, several weeks after the adoption hearing was conducted and when all that remained to be done was the final submission of the Social Services report and the ministerial act of signing the final order of adoption (Appellant's App. C3).

Counsel for appellees notified both the Ulster County and Westchester County Family Courts of the pendency of both proceedings (Appellant's App. C3-C4).[1]

On March 7, 1979, the Ulster County Family Court found that, despite appellant's belatedly filed paternity proceeding in another court, he was not entitled to participate in the adoption proceeding under DRL §§ 111 and 111-a. The final order of adoption was signed that day (J.A. 66-70).

On April 24, 1979, this Court announced its decision in *Caban v. Mohammed,* 441 U. S. 380, wherein DRL §111 was found to be unconstitutional to the extent that it arbitrarily discriminated between mothers and fathers of children born out-of-wedlock by requiring the consent to the adoption of the former but not of the latter.

Appellant, who was a stranger to the adoption proceeding, on June 13, 1979, brought an independent post-termination proceeding in Ulster County Family Court to set aside the adoption based upon *Caban* principles, claiming that the lack of notice to him of the adoption

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[1]Appellant attempts to make much of a motion to change the venue of the Westchester County paternity proceeding to Ulster County, asserting that it was inconsistent for the Ulster County Family Court, on the one hand, to sign the order to show cause for a change of venue to combine the two actions, and then, on the other hand, sign the adoption order thus keeping the proceedings separate. There is no inconsistency. The purpose of the motion to change venue was just that: to have the paternity proceeding brought to Ulster County. It was never intended that the two proceedings be combined. In fact, under New York Law the only way the two proceedings could be heard together was by way of a motion for joinder or consolidation under CPLR §602. No such motion was ever made or contemplated (Appellees' App., p. 1S).

proceeding was a denial of due process and equal protection (J.A. 9).

The Ulster County Family Court denied appellant's application, and that decision was affirmed by the Appellate Division of the State of New York Supreme Court, Third Department, and the Court of Appeals of the State of New York. The Court of Appeals decision is reported at 54 N. Y. 2d 417 (Appellant's App. A1-A18).

Appellant urged below that it was an abuse of discretion for the Ulster County Family Court Judge to have signed the final order of adoption when he knew that appellant was claiming to be the father of the child. Notwithstanding such knowledge, however, adoption is entirely a creature of statute requiring strict adherence thereto, and the appellant had no standing under the Domestic Relations Law to participate in the adoption proceeding. The Court of Appeals specifically found that appellant had ample opportunity to file a notice of intent to claim paternity (the Putative Father Registry above mentioned) which would have assured him the right to participate, and that he failed to avail himself of that opportunity (see footnote 7 to the opinion of the Court of Appeals, Appellant's App. A12).

Appellant's statement of facts purports to give a history of the parties' relationship. As the sole issue upon this appeal relates to the constitutionality of Domestic Relations Law §111-a and its application by the courts below, appellees regard appellant's statement as irrelevant. In any event, appellee, Lorraine Robertson, has characterized appellant's assertions as a litany of "half truths and false suspicions" (J.A. 141-149; 250-253). In fact, she has disputed much of appellant's factual assertions, and has

offered testimony of independent witnesses showing that appellant well knew of appellee's whereabouts and that he took no interest in the child that is the subject of this appeal (J.A. 146-149, 150-155).[2]

It is undisputed that appellant was not entitled to notice under any of the seven notice categories prescribed by Domestic Relations Law §111-a. Appellant's failure to register on the Putative Father Registry was by virtue of his own neglect. Appellant, like any other individual, without exception, natural father or not, could have insured his right to notice by signing the Putative Father Registry created by Domestic Relations Law §111-a and Social Services Law §372-c. He failed to do so.

DRL §111-a unlocks the court's doors to every person claiming status as natural father. Appellant should not be permitted his own private access.

Summary of Argument.

I. This appeal is not within the Court's jurisdiction because the New York Court of Appeals not only failed to rule on the issue of the constitutionality of the New York adoption statute, but specifically refused to consider the question (Appellant's App. A6). Absent a decision on the federal question by the state court below, this Court is

[2]Among other factual disputes, appellee Lorraine Robertson has always maintained that appellant knew of her whereabouts for substantially all times between Jessica's birth in November, 1976, through Lorraine's marriage to Richard in August, 1977, and from the spring of 1978 through March, 1979, when the adoption order was signed (J.S. 146-149). Two independent witnesses gave affidavits that appellant expressed no interest whatsoever in the infant Jessica and that his real interest was in Lorraine's other child, Renee (J.S. 151, 154-155). Further, appellant himself conceded in his own paternity petition that he had not supported the child (J.A. 74).

without jurisdiction. Rule 16.1 [a]; *Cardinale v. Louisiana,* 394 U. S. 437 (1969).

II. The lack of due process and equal protection to putative fathers of children born out-of-wedlock that existed prior to *Stanley v. Illinois,* 405 U. S. 645 (1972), was cured by the enactment of Domestic Relations Law §111-a. This statute gave putative fathers the same right to receive notice of an adoption proceeding as that afforded to mothers, and fathers of children born in-wedlock.

The purpose of DRL §111-a was to codify the *"minimum"* due process requirements enunciated by *Stanley,* to provide a mechanism to make children readily adoptable and to "facilitate prompt planning for the future of the child and permanence of his status" (J.S. App. C15-C16).

The Putative Father Registry created by Domestic Relations Law §111-a and Social Services Law §372-c is open to everyone and anyone who wished to ensure himself of receiving notice of an adoption proceeding. Appellant having failed to take advantage of such opportunity by placing his name on the Registry is now foreclosed from making a belated attack upon the adoption.

The classification of persons entitled to notice under DRL §111-a is extremely broad and in no sense arbitrary. No one who has an interest in the adoption proceeding need be left out if he complies with the statute.

Ignorance of the existence of the Putative Father Registry does not excuse appellant's failure to utilize it. If ignorance of the law were to be a basis for setting aside an adoption, no adoption would be safe from attack. Further, appellant was actively represented by counsel several

months prior to the adoption order and had ample time to enroll on the Registry.

III. The Family Court acted properly in refusing to go beyond the notice requirements of DRL §111-a, since to do so would have been to substitute the court's judgment for that of the Legislature, and to hamper the lawful recognition of an existing family unit. At no time, either in March, 1979 at the time the adoption order was signed, nor even in June, 1979 at the time of making his application to set aside the adoption order, did appellant ever make any tender of a reason why the adoption was not in the child's best interests.

IV. Not having timely established himself as the child's father, nor having taken the statutory steps to receive notice of the adoption proceeding under DRL §111-a, appellant has no standing to assert rights under *Caban v. Mohammed*, 441 U. S. 380 (1979). *Caban* determined the scope of a putative father's participation in the adoption proceeding once he has been made a party thereto. Not being a party, appellant is not entitled to the protections of *Caban*. In any event, *Caban* has no application to this case, since it was decided several weeks after the adoption order become final. *Caban* should not be made retroactive, for to do so would jeopardize the finality of thousands of adoptions completed without the consent of natural fathers, and would result in chaos in the lives of the innocent children and families affected thereby.

POINT I.

The appeal is not within the Court's jurisdiction (Rule 16.1[a]) as the constitutionality of DRL §§ 111 and 111-a was not passed on.

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2) by asserting that the validity of a state statute has been challenged as unconstitutional and the decision is in favor of its validity. Such is not the case.

Relying heavily upon *Caban v. Mohammed,* 441 U. S. 380 (1979), appellant argued that Domestic Relations Law §111 denied him equal protection and due process rights by failing to provide that his consent was required before Jessica could be adopted. He further argued that those rights were violated by DRL §111-a which did not provide that he be given formal notice of the adoption proceeding.

The Court of Appeals did not decide in favor of the validity of those statutes. Rather, it specifically stated that it would not consider such constitutional challenge.

As enunciated by the Court in *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969): "[i]n *Crowell v. Randall,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20 §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391."

Appellant argues that where a federal question is timely raised and the effect of the state court's decision is to uphold the validity of the challenged statute despite a lack of discussion thereof by the court, it will be presumed that the court consciously upheld the statute's validity. This, however, is not the case here. There is no ambiguity in the Court of Appeals' decision. That court did not remain silent on the constitutionality question. Rather, it took great pains to specifically point out that it would not consider that issue.

It should be emphasized that this is not an appeal from the adoption proceeding, but rather an appeal from a separate, independent, post-termination attack upon the finalized adoption. Since this collateral attack was commenced after the announcement of the *Caban* decision, the Court of Appeals chose to determine this case in terms of whether or not *Caban* is to be applied retroactively. It stated as follows:

> "We have no occasion to reach or resolve the substantive aspects of petitioner's contentions. The decision in *Caban* was announced on April 24, 1979, nearly seven weeks after the final order of adoption in this case. The adoption proceeding was completed with the entry of that order. The present application, as previously noted, is a posttermination attack on the final determination in the adoption proceeding by one who was not a party to that proceeding. We conclude that, unless the Supreme Court itself accords full retroactive effect to its holding, the decision and the rationale of *Caban* should be applied only to actions and proceedings that were still in the judicial process at the time the decision was announced or that have since been

> commenced, and not to actions and proceedings which had been finally determined and whose judicial life had then expired (cf. *People v. Torres*, 53 NY2d 213; see *Gager v. White*, 53 NY2d 475, 482). To accord full retroactive effect to *Caban* and to the extension of its rationale to the notice requirements of our adoption statute (and thus to allow its doctrine to be invoked on applications attacking adoption proceedings long since finally concluded) would be, as the dissenters in *Caban* implied (441 US 380, 401, 415-416, *supra*), to work cruel havoc. Accordingly, we hold that sections 111 and 111-a of the Domestic Relations Law as invoked in the adoption proceeding here are immune from constitutional assault predicated on *Caban* and its rationale in the present postfinal determination proceeding (cf. *Chevron Oil Co. v. Huson*, 404 US 97, 106-107)" (Appellant's App. A6).

Appellant would argue that, the *Caban* decision aside, the Court of Appeals could have considered his assault upon the validity of the statutes based upon pre-*Caban* principles. Whether or not this is true is entirely irrelevant, however, since the court affirmatively declined to do so.

Having refused to address the constitutional challenge on any terms but *Caban*, and having refused to consider *Caban* as a basis for a retroactive post-termination attack upon a finalized adoption, the Court of Appeals thus made no decision with regard to the validity of the statutes.

Absent a finding below of the validity of the statutes, this Court has no jurisdiction of the appeal under 28 U.S.C. §1257(2). *Cardinale v. Louisiana*, 394 U. S. 437 (1969).

POINT II.

Domestic Relations Law §111-a is Constitutional.

Of all the laws of man perhaps the most noble is that which permits a child to be adopted and afforded the protection, comfort and love of a home and family. Greater still are the laws that provide for the legitimation of a child born out-of-wedlock, thus removing the social stigma and consequences of bastardy. This is an appeal from an independent attack upon just such an adoption. Such endeavor is without legal foundation and violates the public policy of the State of New York.

After consideration of the threshhold question of the jurisdiction of the Court, there remains only one issue central to this appeal: Did the notice provisions of Domestic Relations Law §111-a afford to appellant due process of law and equal protection of the laws within the meaning of the Fourteenth Amendment to the federal Constitution?

There is no issue of fraud, all courts below having found none (J.S. App. A8-A9). Nor is there any issue of abuse of discretion, all courts below having found none (J.S. App. A9-A13). These questions, having been finally determined by the state courts, are not properly before this Court.

So, too, it is not necessary for this Court to consider the applicability of *Caban v. Mohammed,* 441 U. S. 380 (1979), despite the fact that the Court of Appeals chose to do so. *Caban* determined the scope of a putative father's participation in an adoption proceeding once he has been made a party thereto and only after he has established his paternity. Appellant here, however, has no standing to raise such issue unless and until it is shown that the notice

provisions of DRL §111-a improperly denied to him the opportunity to participate in the proceeding and establish paternity.

There is no constitutional infirmity in the notice requirements of DRL §111-a.

A. ***Stanley v. Illinois.***

Adoption, being unknown to the Common Law, is entirely a product of legislation. "On few questions is decisional law so clear as on this: that adoption, and the abrogation thereof, is, in New York, solely the creature of, and regulated by, statute law." *Matter of Eaton,* 305 N. Y. 162, 165. As such, adoption "requires strict observance of the statutory requirements." *In the Matter of Jessica "XX"* (J.S. App. B4, see also C6).

As noted by the Ulster County Family Court in its decision below: "In this case all provisions of article 7 of the Domestic Relations Law relating to private placement adoptions were strictly complied with, it is not even contended that there were any omissions or shortcuts taken (citation omitted)" (J.S. App. C6, see also A7).

Conceding that all statutory prerequisites to adoption were met,[3] appellant here argues that the adoption statute,

[3]Taking all of appellant's factual assertions at face value and assuming, *arguendo,* their truth, all courts below found that appellant was not entitled to notice of the adoption proceedings. The Family Court found that "[t]he putative father concedes that he does not fall within any of the seven categories of putative father entitled to notice" (J.S. App. C5). The Appellate Division found that "[p]etitioner does not contend that he falls within any of the seven categories" (J.S. App. B4). The Court of Appeals likewise found that "[p]etitioner does not claim that he came within any of the seven categories * * * " (J.S. App. A7).

itself, is infirm by denying him due process and equal protection of the laws. In taking such approach he implies that in creating DRL §111-a the Legislature ignored *Stanley v. Illinois,* 405 U. S. 645 (1972). Such is not the case.

A review of the history of DRL §111-a reveals that the New York Legislature carefully considered and rigidly adhered to the prescriptions of *Stanley v. Illinois,* 405 U. S. 645 (1972).

Standing alone, DRL §111 did not require that notice in adoption proceedings be given to putative fathers of children born out-of-wedlock. In *Stanley*, however, it was first determined that it was a denial of due process and equal protection to presume without a hearing that unmarried fathers are unfit parents and that married fathers are not.

The ramifications of such decision were widespread and the New York adoption statute became immediately suspect. In what was probably the first judicial application of *Stanley* in New York, the court in *Doe v. Department of Social Services,* 71 Misc. 2d 666 (Sup. Ct., Dutchess Co., 1972), determined that the natural father of an illegitimate child, "in those instances where there is no issue as to paternity," should be notified of an impending adoption.

In the aftermath of *Stanley* and *Doe,* questions arose as to the nature and scope of notice to be given to putative fathers.

Who is entitled to notice in those instances where, as here, there *is* an issue as to paternity? A mother may be

deceased and thus unable to name the father. She may be promiscuous and not know the father's identity. Or she may be unwilling to disclose such information. Neither *Stanley* nor other judicial determinations at that time gave guidance as to the scope and adequacy of notice in such circumstances.

Out of *Stanley* DRL §111-a was born. That statute provides a mechanism whereby all persons who may claim paternity of a child born out-of-wedlock may receive notice of an adoption proceeding and an opportunity to be heard.

Appellant's argument that the statute is arbitrarily gender-based is not viable. While DRL §111 provides for notice to mothers of children born out-of-wedlock, DRL §111-a now gives the same notice to fathers of illegitimates.

Appellant's argument that there is an arbitrary distinction regarding fathers of children born in-wedlock and fathers of children born out-of-wedlock is equally untenable, as DRL §111-a gives the latter the same notice and opportunity to be heard as the former.

It appears that appellant's most serious constitutional challenge to the adoption statute is that the New York Legislature ignored *Stanley* and promulgated a statute that engages in a system of classification of persons entitled to notice that left him out. There is no constitutional defect.

In reviewing New York Law, this court has stated that the presumption of constitutionality is to be indulged. *Goldblatt v. Town of Hempstead, N.Y.*, 369 U. S. 590 (1962). "This presumption is accompanied by another as

to the statute: that the Legislature has investigated and found the existence of a situation showing or indicating the need for or desirability of the legislation (*East N.Y. Sav. Bank v. Hahn*, 293 N. Y. 622, affd. 326 U. S. 230)." *Van Berkel v. Power*, 16 N. Y. 2d 37, 40 (1965).

Indeed, the State Legislature carefully considered *Stanley*, and the Temporary State Commission on Child Welfare made a thorough investigation of the need to revise the New York adoption statute. In its decision below the Ulster County Family Court synopsized the legislative history of Domestic Relations Law §111-a:

> In its report to the Governor and the Legislature of the State of New York, dated October 1976 The Temporary State Commission on Child Welfare of which Senator Joseph R. Pisani was chairman, explains the need for legislation to dispel the confusion arising from the absence of clear statutory guidelines in the wake of the United States Supreme Court decision in *Stanley v. Illinois* (405 US 645, *supra*) and the New York Court of Appeals decision in *Matter of Malpica-Orsini* (36 NY2d 568, app dsmd by the US Supreme Ct "for want of substantial federal question" 423 US 1042, *supra*). The commission explains the purpose of section 111-a of the Domestic Relations Law (L 1976, ch 665) as follows:
>
> "This measure will dispel uncertainties by providing clear constitutional statutory guidelines for notice to fathers of out-of-wedlock children. It will establish a desired finality in adoption proceedings and will provide an expeditious method for child placement agencies of identifying those fathers who

are entitled to notice through the creation of a registry of such fathers within the State Department of Social Services. Conversely, the bill will afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to be notified and have an opportunity to be heard. It will also obviate an existing disparity of Appellate Division decisions by permitting such fathers to be petitioners in paternity proceedings.

"The measure is intended to codify the minimum protections for the putative father which *Stanley* would require. In so doing it reflects policy decisions to (a) codify constitutional requirements, (b) clearly establish, as early as possible in a child's life, the rights, interests and obligations of all parties; (c) facilitate prompt planning for the future of the child and permanance of his status; and (d) through the foregoing, promote the best interests of children."

The memorandum in support of the bill to add new sections 384-c and 372-c to the Social Services Law and a new section 111-a to the Domestic Relations Law and amending section 254 of the Judiciary Law and numerous sections of article 5 of the Family Court Act points out that despite the Court of Appeals decision in *Matter of Malpica-Orsini (supra),* "there still exists uncertainty as to the significance of the *Stanley* decision with respect to: (a) which fathers of out-of-wedlock children are entitled to notice; (b) in which proceedings; (c) what sort of search, if any, is required in order to ascertain the identity and location of putative

> fathers. *This bill would dispel uncertainties by providing clear constitutional statutory guidelines for notice to putative fathers".* (NY Legis Ann, 1976, p 258; emphasis supplied.) In addition, "[i]t would establish much desired finality in adoption proceedings, and would provide an expeditious method for child placement agencies to ascertain those fathers who are entitled to notice. Conversely, the bill would afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to notice and an opportunity to be heard" (NY Legis Ann, 1976, p 258).
>
> In view of this legislative history of section 111-a of the Domestic Relations Law it is clear to this court that the State of New York had a legitimate State interest in enacting section 111-a of the Domestic Relations Law and in establishing a putative father registry (Social Services Law, §372-c); that its classification of putative fathers is rational and reasonable and clearly is not palpably arbitrary. I therefore find no unconstitutional infirmity in the statue (J.S. App. C15-C16).[4]

Thus, it is clear that the Legislature created DRL §111-a for the specific purpose of determining "clear constitutional statutory guidelines for notice to putative fathers," in rigid adherence to *Stanley*.

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[4]The text of the Report of the State Commission on Child Welfare appears at page 1Y in the Appellees' Appendix following this brief.

B. Statutory Classification.

Appellant argues that because DRL §111-a resorts to classification it denies him due process and equal protection as he does not fall within any of the seven categories of putative fathers entitled to notice. Mere classification, however, does not render a statute constitutionally defective.

As noted in *"HH" v. "II,"* 31 N. Y. 2d 154, 158 (1972), appeal dismissed 409 U. S. 1121:

> "It is fundamental, of course, that the Legislature may classify persons for purposes of legislation without infringement of the equal protection guarantee and that its discretion in this regard is broad and will not be disturbed if any state of facts can reasonably be conceived to sustain its classification (*Matter of 436 W. 34th St. Corp. v. McGoldrick,* 288 N.Y. 346, 350, mot. for rearg. den. 289 N.Y. 673; *Shielcrawt v. Moffett,* 49 N.Y.S.2d 64, 76, affd. 268 App.Div. 352, revd. on other grounds 294 N.Y. 180, mot. for rearg. den. 294 N.Y. 840; *New York R. T. Corp. v. City of New York,* 303 U.S. 573) or even if the classification be fairly debatable (*Matter of Presnell v. Leslie,* 3 N.Y.2d 384, 390 mot. for rearg. den. 4 N.Y.2d 1046), provided only it shall not be palpably arbitrary (*New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63)."

In *McGowan v. Maryland,* 366 U. S. 420, 425-426 (1961), this Court noted as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth

> Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The classification of putative fathers entitled to notice of adoption proceedings is entirely rational, reasonable and justified.

The avowed State objective is revealed in the legislative history of DRL §111-a, and most pointedly in a letter to the Governor's Counsel dated July 7, 1976 from Senator Joseph R. Pisani, Chairman of The Temporary State Commission on Child Welfare. In such letter Senator Pisani states as follows:

> "This bill is intended to codify the minimum protections for the putative father which Stanley would require. In so doing it reflects policy decisions to a) codify constitutional requirements; b) achieve finality, as early as possible in a child's life, in the establishment of the rights, interests and obligations of all parties, and, conversely, to eliminate extant uncertainty, as soon as possible in relation to these rights, interests and duties; c) to facilitate planning for the future of the child and permanence of his status; and d) through the

> foregoing, to promote the best interests of children" (underscoring in original).[5]

It is thus clear that the New York Legislature recognized a public need to facilitate adoptions, and favored a policy of removing as many impediments to adoption as may be safely accomplished within the confines of the Constitution. It specifically indicated an intention to create a notice mechanism that grants the "minimum" protections required by *Stanley*.

Indeed, the Legislature could have gone far beyond *Stanley* and required an exhaustive search for the natural father, and prohibited an adoption unless and until he be found. The Legislature, however, surely recognized that to make such an onerous requirement would leave thousands of adoptable children homeless for want of positive identification and location of their fathers.

A review of the classes of putative fathers entitled to notice under DRL §111-a shows that the Legislature determined to afford to all fathers of out-of-wedlock children an opportunity to receive notice of an adoption proceeding.

DRL §111-a, subdivisions 2(a) and (b), rationally and quite naturally provide for notice to be given to anyone who has been lawfully adjudicated the father of the child. No one may seriously quarrel with the proposition that a father whose rights as such have been adjudicated, stands in a different position from any other person whose rights have not been determined. Other provisions of DRL

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[5]This letter is set forth at pages 16 through 20 of the New York Attorney General's Appendix to the New York Court of Appeals, a copy of which has been lodged with the Supreme Court.

§111-a—particularly subdivisions 2(d), (e), (f) and (g)—require notice to persons who obviously, or at least presumptively, may be the natural father.

In an effort to give all other putative fathers, without exception, an equal opportunity to be heard, and in an obvious effort to be anything but arbitrary, the Legislature created DRL §111-a, subdivision 2(c) and Social Services Law §372-c.

DRL §111-a, subdivision 2(c) provides that notice of an adoption proceeding must be given to "any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law."

The opportunity to so file with the "Putative Father Registry" set up under Social Services Law §372-c is open to everyone and anyone without discrimination. The filing of a notice of intent to claim paternity is entirely within the control of all putative fathers and is available to each of them. In fact, the statute is so broad, that—as absurd as it may seem—even a woman could place her name upon the Putative Father Registry and be entitled to notice and an opportunity to be heard. Accordingly, there is no classification of natural father who cannot put himself in a position to receive notice under DRL §111-a, and thus there is no denial of due process or equal protection.

C. Knowledge of Putative Father Registry.

Despite the fact that the Putative Father Registry is available to all, appellant's *amici*, argue that the poor

laymen they are called upon to represent are likely to be ignorant of the requirements of DRL §111-a and the Registry.[6]

It must not be forgotten that the State's interest is not to overly protect the parents of illegitimate children. The State's avowed interest is to foster adoptions, to legitimatize bastards, and to reduce impediments to children finding their way into stable homes and families. The statute would only offend the Fourteenth Amendment if it were to fail to provide any mechanism for notice to putative fathers. Since DRL §111-a does, in fact, give all putative fathers an opportunity to ensure receiving notice, it matters not that the statute does not go further.

It is curious that *amici* find the notice statute restrictive. The legislative history of DRL §111-a reveals that a sister legal services organization disagrees. The Legal Aid Society, as shown by its by-laws and stationery, has as its purpose "to render legal aid in the City of New York to persons who are without adequate means to employ other counsel" (Appellees' App. p. 1Z, *infra*). In a letter to the Governor's Counsel dated July 9, 1976, the Legal Aid Society "strongly" urged the Governor to sign into law the bill creating DRL §111-a, stating as follows:

> "The Legal Aid Society supports both the bill's broad definition of out-of-wedlock fathers to whom notice must be given and the creation of a mechanism for filing a declaration of paternity" (Appellees' App., pp. 1Z-2Z, *infra*).

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[6] *Amici* speculate that the reason the Putative Father Registry is not heavily utilized by fathers of children born out-of-wedlock is because they are unaware of its existence. A more plausible explanation is that perhaps most fathers of illegitimate children are not anxious to establish paternity and subject themselves to support payments.

Appellant and his *amici* further argue that ignorance of the law should excuse a putative father's failure to sign the Registry. This position is entirely untenable. To accept such argument would mean that no adoption would be final, and no adoption would be safe from subsequent attack upon the mere profession of ignorance by an unserved putative father. Further, such a result would also encourage putative fathers to engage in extortion schemes whereby they might threaten an attack upon a consummated adoption in order to be "bought off."

In any event, appellant here should not be heard to plead ignorance of the law. He had a right under statute as early as January 1, 1977, to either finally establish his paternity (FCA §522) or to put his name on the Putative Father Registry (DRL §111-a, SSL §372-c). This latter right was available to him with or without his knowledge of the whereabouts of the mother and child. Further, at least three months before the order of adoption was signed appellant was actively represented by counsel. In fact, in his letter dated December 12, 1978, appellant's lawyer threatened "resorting to the remedies and procedures which are available in the courts" (J.A. 76).

POINT III.

The Family Court acted properly.

As noted earlier, the issue of abuse of discretion is not properly before the Court, all courts below having found none. Nevertheless, appellant and his *amici* have questioned the wisdom of the Ulster County Family Court in not extending the privileges of DRL §111-a to appellant once the court learned of his existence.

Once a statute rises to the level of constitutionality, it cannot be considered an abuse of discretion for the court to refuse to require more than the statute requires. To go beyond the statute would be to substitute the court's judgment for that of the legislature. As stated in *In re Adoption of Malpica—Orsini,* 36 N. Y. 2d 568, 571 (1975), "[u]nder the doctrine of separation of powers, courts may not legislate (*Bright Homes v. Wright,* 8 N. Y. 2d 157, 162; *Matter of Metropolitan Life Ins. Co. v. Boland,* 281 N. Y. 357, 361), or rewrite (*Matter of Chase Nat. Bank v. Guardian Realties,* 283 N. Y. 350, 360; *Matter of Tormey v. LaGuardia,* 278 N. Y. 450, 451), or extend legislation (*People ex rel. Newman v. Foster,* 297 N. Y. 27, 31; *Matter of Hogan v. Supreme Ct.,* 281 N. Y. 572, 576)."

In the courts below appellees argued that in any event the Family Court had no discretion to exercise, primarily because the discretionary authority granted under DRL §111 subd. 3 is limited to putting on notice only those persons whose consent to adoption was waived under DRL §111 subd. 2. Since appellant did not claim to fall within subdivision 2, the Family Court had no authority to give him discretionary notice under subdivision 3. While disagreeing with appellees' position the Court of Appeals still found no abuse of discretion.

To determine if the Family Court Judge erred in his discretionary judgment one must, as the Court of Appeals did, view the matter from the prospective of March 7, 1979, the day the adoption order was signed.

On March 7, 1979 *Caban v. Mohammed,* 441 U. S. 380 (1979), had not yet been decided. Accordingly, the state of the law in New York was that fathers of children born out-of-wedlock, once they had established their paternity,

could be heard only on the best interests of the child. They had no right to veto an adoption by withholding their consent.

At this point, the Family Court faced a dilemma: what good would be achieved by exercising a questionable discretionary power to permit appellant to participate? To do so would be to run afoul of this Court's own policy as espoused in *Quilloin v. Walcott*, 434 U. S. 246, 255 (1978):

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U. S. 816, 862-863 (1977) (STEWART, J., concurring in judgment). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interest of the child."

In the present case we have a claimant to paternity who has never at any time had or sought legal custody of the

child. In fact, in his own paternity petition he did not seek custody, just visitation (J.A. 73-74).

In this case we do not have a proposed adoption which would place the child with strangers. Rather, as in *Quilloin,* we have an adoption that gave "full recognition to a family unit already in existence, a result desired by all concerned, except appellant."

Armed with a Department of Social Services report fully supporting the adoption (Appellant's App. C4), and in view of this Court's attitude towards giving full recognition to an existing family unit, it can hardly be considered an abuse of discretion to have decided not to extend DRL §111-a to benefit the appellant.

The Family Court's good judgment was later confirmed by the submission appellant eventually made to the court upon his June, 1979 application to set aside the adoption. As noted by the Court of Appeals:

> "In this instance, the petition and supporting papers contained no tender of evidence directly bearing on the best interests of Jessica. There was a submission with respect to the history of the mother's alleged emotional instability, but this was essentially irrelevant inasmuch as no proposal was advanced at any time that Jessica should be removed from her mother's custody or the home in which she dwelt with her mother and her stepfather; petitioner has never sought more than rights of visitation" (Appellant's App. A12).

In light of the foregoing it is submitted that Judge Elwyn acted wisely and in the best interests of Jessica.

POINT IV.

Caban v. Mohammed.

Appellant argues "that the holding of *Caban v. Mohammed,* 441 U. S. 380 (1979), should be applied to the facts and circumstances of this case" (Appellant's Brief, p. 27). In fact, *Caban* has no application here and appellant has no standing to assert rights thereunder.

The order of adoption was signed on March 7, 1979. At the time the constitutionality of the New York adoption statute had been established by the Court of Appeals in *In re Malpica-Orsini,* 36 N. Y. 2d 568 (1975), appeal dismissed as *Orsini v. Blasi,* 423 U. S. 1042 (1976).

On April 24, 1979, some seven weeks after the granting of the order of adoption, this court in *Caban v. Mohammed,* 441 U. S. 380 (1979), determined that DRL §111 (not DRL §111-a) is partially unconstitutional in that it arbitrarily discriminates between mothers and fathers of children born out-of-wedlock by requiring the consent to the adoption by the former, but not the latter. It is emphasized that no court has ever found the notice provisions of DRL §111 or DRL §111-a unconstitutional. The only aspect of the adoption law that was found to be infirm was the gender based distinction concerning whose consent was necessary for adoption.

Of paramount consideration here is the fact that appellees have not conceded that appellant is the natural father of Jessica, and his paternity never has been lawfully established. Accordingly, unless and until he establishes paternity, he has no standing to assert rights under *Caban.*

In United States v. Herrera, 584 F. 2d 1137, 1148 (C. A. 2d Cir. 1978), the court synopsized the rulings of this Court and concisely enunciated the law regarding the issue of standing.

> "The constitutionality of a statute is to be considered in the light of the standing of a party who seeks to raise the question and of its particular application. (citations omitted) It is firmly established that the constitutionality of a statute may not be attacked by one whose rights are not affected by the operation of the statute. (citations omitted) To raise the question he must show that the alleged unconstitutional feature of the statute injures him, and so operates as to deprive him of a constitutional right. (citations omitted) It is, of course, a prerequisite that he establish in himself the claimed right which is alleged to be infringed. (citations omitted) A person ordinarily is precluded from challenging the constitutionality of statutes invoking the rights of others. (citations omitted) It must affirmatively appear that the person attacking the statute comes within the class of persons affected by it (citations omitted)."

Appellant, having failed to exercise his right to receive notice under DRL §111-a by not signing the Putative Father Registry, thus has no standing to assert rights under *Caban.*

In any event, *Caban* has no application in this case. In *Caban* it was very carefully pointed out that the adoption statute is not unconstitutional with respect to most cases and may still be applied. As noted by Mr. Justice Stevens, "as I read the Court's opinion, the statute now in effect

may be enforced as usual unless 'the adoption of older children is sought,' * * * and 'the father has established a substantial relationship with the child and is willing to admit his paternity.' " *Caban v. Mohammed,* 441 U. S. 380, 416.

In the present case, although we apparently have a putative father who is willing to admit paternity, we have a mother who has not conceded same. Further, assuming appellant is the father, we do not have the adoption of an older child, but a child who was but 25 months old at the commencement of the adoption proceeding. Further, the putative father has never established "a substantial relationship with the child" as required by the court. In fact, it is admitted that the appellant and the infant have no relationship.

In any and all events, assuming again all the facts in appellant's favor, *Caban* still is not applicable to this case, as it was rendered some seven weeks after the conclusion of the adoption proceeding. Appellees submit *Caban* is not retroactive.

The opinion of the majority in *Caban* did not discuss the question of the retroactive effect of the decision. It is apparent, however, that retroactive effect cannot and will not be given thereto, for to do so would wreak chaos and havoc in our society. If *Caban* were to be applied retroactively the parentage and rights of inheritance, descent and succession of every adopted out-of-wedlock child would be in doubt. As noted by Mr. Justice Stevens:

> "The adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family

> and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retroactive application of this ruling. See *Chevron Oil Co. v. Huson,* 404 U. S. 97, 106-107. Families that include adopted children need have no concern about the probable impact of this case on their familial security" (*Caban v. Mohammed, supra,* opinion of Mr. Justice Stevens at 441 U. S. 380, 415-416).

As noted by the Court in *Chevron Oil Co. v. Huson,* 404 U. S. 97, 107, "(f)inally, we have weighed the inequity imposed by retroactive application for '(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' *Cipriano v. City of Houma,* 395 U. S. 701 at 706."

The Appellate Division and Court of Appeals below fully concurred with Mr. Justice Stevens and adopted his position entirely (Appellant's App. B4, A6).

CONCLUSION.

The decision, order and judgment of the Court of Appeals should be affirmed in all respects.

By the time this appeal will be reached for argument the infant in this case will be six years old.

She has resided with her mother since birth. She has resided with her adoptive father since August, 1977. She has known no other parents.

To permit a belated attack upon her adoption by someone who is a stranger to her, by someone who had never contributed to her support, by someone who independent witnesses confirm expressed no desire to have anything to do with her, would only serve to deny lawful recognition of an existing family unit and to condemn the infant to a life of bastardy, all in an over-zealous attempt to give appellant greater process than the Constitution requires. Such a result surely cannot be in the child's best interests and can only serve to put a gap between her and the only family she has ever known.

In light of the foregoing, the decision, order and judgment of the Court of Appeals should be affirmed in all respects.

Respectfully submitted,

JAY L. SAMOFF
STREIFER, BARNOVITZ & SAMOFF
Attorneys for Appellees Robertson
9 Main Street—U.P.O. Box 3515
Kingston, NY 12401
(914) 331-4977

APPELLEES' APPENDIX.

Appendix S—Civil Practice Laws and Rules §602 (a).

§602. Consolidation.

(a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Appendix T—Domestic Relations Law §111.

§ 111. Whose consent required

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental illness or mental retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law.

3. Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c) of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in paragraph (d) of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

Appendix U—Domestic Relations Law §111-a.

§ 111-a. Notice in certain proceedings to fathers of children born out-of-wedlock

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any other law, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who has previously received notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child or the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother subsequent to the birth of the child.

3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

4. Notice under this section shall be given at least ten days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity pursuant to section three hundred seventy-two-c of the social services law, to the address last entered therein. Notice by publication shall not be required to be given to a person entitled to notice pursuant to the provisions of this section.

5. A person may waive his right to notice under this section by written instrument subscribed by him and acknowledged or proved in the manner required for the execution of a surrender instrument pursuant to section three hundred eighty-four of the social services law.

6. The notice given to persons pursuant to this section shall inform them of the time, date, place and purpose of the proceeding and shall also apprise such persons that their failure to appear shall constitute a denial of their interest in the child which denial may result, without further notice, in the adoption or other disposition of the custody of the child.

7. No order of adoption and no order of the court pursuant to section one hundred fifteen-b shall be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section but failed to appear, or who waived notice pursuant to subdivision five. Nor shall any order of adoption be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section in any previous proceeding pursuant to section one hundred fifteen-b in which the court determined that the best interests of the child would be served by adoption of the child by the adoptive parents.

Appendix V—Family Court Act §522.

§522. Persons who may originate proceedings.

Proceedings to establish the paternity of the child and to compel support under this article may be commenced by the mother, whether a minor or not, by a person alleging to be the father, whether a minor or not, by the child's guardian or other person standing in a parental relation or being the next of kin of the child, or by any authorized representative of an incorporated society doing charitable or philanthropic work, or if the mother or child is or is likely to become a public charge on a county, city or town, by a public welfare official of the county, city or town where the mother resides or the child is found.

Appendix W—Public Health Law §4135, Subdivision 2.

§4135. Birth certificate; child born out of wedlock.

2. The name of the putative father of a child born out of wedlock shall not be entered on the certificate of birth prior to filing without the consent in writing of both the mother and putative father, duly verified, and filed with the record of birth, except that with respect to a child born out of wedlock to a married woman, a determination of parentage made by a court of competent jurisdiction shall be required before the putative father's name may be entered on the birth certificate.

Appendix X—Social Services Law §372-c.

§372-c. Putative father registry.

1. The department shall establish a putative father registry which shall record the names and addresses of: (a) any person adjudicated by a court of this state to be the father of a child born out-of-wedlock; (b) any person who has filed with the registry before or after the birth of a child out-of-wedlock, a notice of intent to claim paternity of the child; (c) any person adjudicated by a court of another state or territory of the United States to be the father of an out-of-wedlock child, where a certified copy of the court order has been filed with the registry by such person or any other person.

2. A person filing a notice of intent to claim paternity of a child shall include therein his current address and shall notify the registry of any change of address pursuant to procedures prescribed by regulations of the department.

3. A person who has filed a notice of intent to claim paternity may at any time revoke a notice of intent to claim paternity previously filed therewith and, upon receipt of such notification by the registry, the revoked notice of intent to claim paternity shall be deemed a nullity *nunc pro tunc.*

4. An unrevoked notice of intent to claim paternity of a child may be introduced in evidence by any party, other than the person who filed such notice, in any proceeding in which such fact may be relevant.

5. The department shall, upon request, provide the names and addresses of persons listed with the registry to any court or authorized agency, and such information shall not be divulged to any other person, except upon order of a court for good cause shown.

Appendix Y—Excerpt from Legislative History of DRL §111-a; Chap. 665, L. 1976; Second Report of the State Commission on Child Welfare, October, 1976.

The rights of fathers of children born out-of-wedlock.

Serious questions have been raised, as to the rights of the fathers of children born out-of-wedlock to have a voice in the various proceedings affecting the status and future of their offspring, by the U. S. Supreme Court decision in *Stanley v. Illinois*, 905 U. S. 645, and, more recently the New York Court of Appeals decision in *Orsini v. Blasi,* 36 N. Y. 2d 568, appeal dismissed by the U. S. Supreme Court "for want of a substantial federal question", 96 S. Ct. 765 (1976).

These questions have created substantial delays in initiating proceedings to free children for adoption in that questions have been raised on such matters as the right to notice, to be heard, to participate as a party, and the obligation of agencies to make diligent searches for putative fathers whose rights, constitutional or otherwise, may be in jeopardy. The nebulous state of the law and the resulting confusion on the part of agencies, attorneys and judges made the study of this problem a matter of priority for the Commission.

In the aftermath of the *Stanley* decision, states and public and voluntary agencies have either overreacted or underreacted because of the absence of clear statutory guidelines. Overreaction has often been noted in agency or administrative practices requiring extensive searches for unidentified or unknown putative fathers which have resulted in failures to free children for adoption and an inability to plan for the future of many children. Needless, often futile and protracted, searches have also placed heavy staff and financial burdens on both public and

voluntary agencies which can ill afford them. Overreaction has also been characterized, in some states, by the equation of the rights of fathers of in-wedlock and out-of-wedlock children (for example, by requiring the latter's consent to the child's adoption) a legal proposition not supported by the *Stanley* decision and clearly nullified by the Supreme Court's dismissal of the appeal of the New York Court of Appeals decision in *Orsini*.

On the other hand, underreaction to *Stanley*, by failing to provide concerned, adjudicated or other readily identifiable fathers of out-of-wedlock children with notice and an opportunity to be heard in proceedings involving the child's custody, guardianship or adoption, may result ultimately in the vacating of court orders in such proceedings.

To assist in its efforts, with funding from the Edna McConnell Clark Foundation, the Commission was able to study approaches taken by the states under *Stanley* and to develop a solution to meet New York's problems and requirements. On March 31, 1976, the Commission convened a meeting in Albany of interested parties, including representatives of the State Departments of Health and Social Services, the New York City Department of Social Services, the Office of Court Administration, the Law Revision Commission, the Legislature, and the Governor's Program Office. An agenda of issues had been prepared by the Commission staff, and these issues were discussed and led to fundamental decisions by the group. A bill was thereupon prepared by Commission staff (S. 10484, A. 12944) and introduced by Senators Pisani, Dunne and Halperin and Assemblymen Blumenthal and Gottfried, which reflected the decisions reached at the meeting.

This measure will dispel uncertainties by providing clear constitutional statutory guidelines for notice to fathers of

out-of-wedlock children. It will establish a desired finality in adoption proceedings, and will provide an expeditious method for child placement agencies of identifying those fathers who are entitled to notice through the creation of a registry of such fathers within the State Department of Social Services. Conversely, the bill will afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to be notified and to have an opportunity to be heard. It will also obviate an existing disparity in Appellate Division decisions by permitting such fathers to be petitioners in paternity proceedings.

The measure is intended to codify the minimum protections for the putative father which *Stanley* would require. In so doing, it reflects policy decisions to (a) codify constitutional requirements; (b) clearly establish, as early as possible in a child's life, the rights, interests and obligations of all parties; (c) facilitate prompt planning for the future of the child and permanence of his status; and (d) through the foregoing, promote the best interests of children.

The bill passed the Legislature and was signed into Law by the Governor as Chapter 665 of the Laws of 1976.

Upon signing the bill, the Governor recommended that provisions governing the time for a putative father to respond to legal process be extended beyond the ten days afforded in the bill. The Commission intends to recommend corrective legislation early at the 1977 Legislative Session.

The foregoing appears at pages 4 through 6 of the New York Attorney General's Appendix to the New York Court of Appeals, a copy of which has been lodged with the Supreme Court.

Appendix Z—Excerpt from Legislature History of DRL §111-a; Letter from The Legal Aid Society to Governor's Counsel, July 9, 1976.

THE LEGAL AID SOCIETY

Fifteen Park Row
New York, N. Y. 10038
(212) 577-3300

July 9, 1976

The Honorable Judah Gribetz
Executive Chambers
State Capitol
Albany, New York 12224

Re: *S10484/76—Pisani, Dunne, Halperin*

Dear Mr. Gribetz,

The Legal Aid Society strongly urges the Governor to sign this bill into law.

The bill is directed towards defining the rights of fathers of out-of-wedlock children. It represents an admirable legislative effort to define some aspects of the paternal relationship between a father and the out-of-wedlock child in light of the issues raised by the 1972 United States Supreme Court decision, *Stanley v. Illinois,* 405 U. S. 645, and the 1976 decision of the New York Court of Appeals, *In re the Adoption of Malpica-Orsini,* 36 N. Y. 2d 568, App. Dsm'd. 96 S. Ct. 965 (1976).

The Legal Aid Society supports both the bill's broad definition of out-of-wedlock fathers to whom notice must be given and the creation of a mechanism for filing a declaration of paternity. We also support the legislative clarification of the right of the out-of-wedlock father to institute a paternity proceeding. The recognition of the father's ability to legally establish the paternal relationship is not only consistent with the principles set forth in *Stanley v. Illinois* but also becomes more important as the rights of out-of-wedlock children to receive government and other benefits through their fathers are increasingly recognized.

We have some concern about the type and time of notice mandated by the statute—that is, registered or certified mail 10 days prior to the proceeding. However, the bill's fair and clear definitions of the rights and obligations of putative fathers are so basic to the full determination of the rights and best interests of the out-of-wedlock child that we believe this bill should be signed into law.

Very truly yours,

LENORE GITTIS
Director of Legislation

The foregoing appears at pages 40-41 of the New York Attorney General's Appendix to the New York Court of Appeals, a copy of which has been lodged with the Supreme Court.

Appellee's Brief

2

Office - Supreme Court, U.S.
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No. 81-1756

IN THE

Supreme Court of the United States

October Term, 1982

In the Matter of the Adoption of

JESSICA MARTZ

JONATHAN LEHR,

Appellant,

against

LORRAINE ROBERTSON and
RICHARD N. ROBERTSON, JR.,

Appellees,

ROBERT ABRAMS, Attorney General of the
State of New York,

Intervenor-Appellee.

On Appeal fom the Court of Appeals
of the State of New York

BRIEF FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

September 16, 1982

ROBERT ABRAMS
Attorney General of the
State of New York
Intervenor-Appellee Pro Se
Two World Trade Center
New York, New York 10047
(212) 488-7590

PETER H. SCHIFF
Acting Attorney-in-Chief,
Appeals and Opinions

ROBERT J. SCHACK
Assistant Attorney General
Of Counsel

Questions Presented

1. Whether a substantial federal question is presented by a putative father who failed to take advantage of the notice and opportunities he had under State law to appear in an adoption proceeding and who had no right under governing case-law at the time of the adoption to veto it?

2. Whether New York Domestic Relations Law § 111-a establishes reasonable categories under the Equal Protection and Due Process Clauses of putative fathers entitled to notice of adoption?

3. Whether *Caban* v. *Mohammed*, 441 U.S. 380 (1979), is available to a putative father who failed to appear in a timely fashion in an adoption proceeding completed before *Caban* was decided, although he could have done so?

4. Whether *Caban* should be construed to afford a putative father a veto over an adoption when he has never established a familial relationship with his alleged child, although able to do so?

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No. 81-1756

IN THE

Supreme Court of the United States

October Term, 1982

In the Matter of the Adoption of

JESSICA MARTZ

JONATHAN LEHR,

Appellant,

against

LORRAINE ROBERTSON and RICHARD N. ROBERTSON, JR.,

Appellees,

ROBERT ABRAMS, Attorney General of the State of New York,

Intervenor-Appellee.

On Appeal fom the Court of Appeals of the State of New York

BRIEF FOR APPELLEE ATTORNEY GENERAL OF THE STATE OF NEW YORK

Preliminary Statement

Pursuant to New York Civil Practice Law and Rules (CPLR) § 1012(b), N.Y. Executive Law § 71, the Attorney General appears in this proceeding in defense of the constitutionality of N.Y. Domestic Relations Law (DRL) §§ 111, 111-a. The Attorney General intervened at the request of

the Family Court, Ulster County, and has participated as a party intervenor-respondent at each stage of the litigation.

Appendix A to this Brief outlines New York's statutory framework for adoption and sets out the relevant statutes (DRL §§ 111, 111-a, 116, N.Y. Social Services Law [SSL] § 372-c) as they read in 1979 and at the time of this appeal. Appendix B contains relevant portions of the legislative history of DRL §§ 111, 111-a, drawn from the fuller compilation of legislative history (A.G. App.) that the Attorney General served on the parties, filed with the courts below and lodged with this Court.*

Statement of the Case

A. Orders and jurisdiction

This is an appeal from an order of the N.Y. Court of Appeals entered November 24, 1981 (Appellant's Jurisdictional Statement [JS] Appendix A; decision published as *Matter of Jessica "XX"* at 54 N.Y.2d 417 and printed on this appeal at JS App. A), which affirmed the December 11, 1980, order of the N.Y. Supreme Court, Appellate Division, Third Department (Joint Appendix [JA] 260; decision published as *Matter of Jessica "XX"* at 77 A.D.2d 381 and printed on this appeal at JS App. B), affirming the November 30, 1979, order of the Family Court, Ulster County (JA 254; decision published as *Matter of Jessica Martz* at 102 Misc. 2d 102 and printed on this appeal at JS

* The compilation was printed as Attorney General's Appendix in the New York Court of Appeals. It contains the complete official bill jackets for the chapter laws enacting and amending DRL § 111-a and amending DRL § 111 to include putative fathers (A.G. App. 12-112), excerpts from the official report of the Temporary State Commission on Child Welfare documenting the need for DRL § 111-a (A.G. App. 1-11), the sponsor's Memorandum in Support for the 1980 amendments to those statutes (A.G. App. 114-5), and the sponsor's letter to Family and Surrogate's Court Judges transmitting the 1980 amendments (A.G. App. 116-22). A copy of that Appendix is being served again on the private parties and is being lodged with the Clerk of the Court on the filing of this Brief.

App. C), which, *inter alia*, denied appellant's application (JA 4) to open, vacate and/or set aside an order of adoption by the Ulster County Family Court entered March 7, 1979 (JA 66). By order dated May 17, 1982, this Court "['postponed'] further consideration of the question of jurisdiction . . . to the hearing of the case on the merits" (JA 266).

B. Parties

The parties on the appeal are appellant Jonathan Lehr (appellant or Jonathan); appellees Lorraine Martz Robertson and her husband, Richard N. Robertson, Jr. (appellees or Lorraine and Richard); and intervenor-appellee Attorney General. Lorraine's daughter Jessica Martz (Jessica) is the infant subject of the adoption proceeding which the appeal challenges. Also involved in the facts from which the appeal arises are Renee Martz (Renee), Lorraine's other daughter, and Jonathan's mother, Helen Lehr (Helen).

C. Facts and proceedings

According to Jonathan's papers and Lorraine's uncontroverted allegations,* in 1971, when Lorraine was six-

* The text of this section of the Attorney General's Brief sets forth the facts as Jonathan pled them, whether or not disputed by Lorraine, and those facts alleged by Lorraine that Jonathan does not deny. Inconsistencies and items controverted by Lorraine are set forth in the footnotes. (Since appellant's petition was dismissed without a hearing, the trial and appellate courts presumably found that, assuming all his allegations were true, he still had failed to establish a *prima facie* case or to show that there were material triable fact. *See* JS App. C10: 102 Misc. 2d at 109, 115; JS App. A12-3: 54 N.Y.2d at 429-30 [*Jones*, J., for the Court]; JS App. A16-8 nn. 3-5: 54 N.Y.2d at 434-6 nn. 3-5 [*Cooke*, C.J., dissenting].)

The Brief's argument will discuss the inferences to be drawn from the facts alleged. (In view of the strong judicial and legislative policy against abrogating or reopening completed adoptions, *Matter of Natural Parents of Their Child "Nicky"* v. *Dumpson*, 81 Misc. 2d 132, 140-1 [Kings Surr. 1975], citing *Matter of Eaton*, 305 N.Y. 162, 165 [1962]; *People ex rel. Gramont* v. *Free Synagogue Child Adoption Committee*, 194 Misc. 332, 336 [N.Y. Co. Sup.] [*Botein*, J.], *app. dsmd.* 275 App. Div. 823 [1st Dept. 1949], appellant bore a heavy burden of proof in this proceeding and was not entitled to have the facts read in a favorable manner.)

teen years old, Jonathan's mother Helen gave her a home and made Lorraine her "ward" so that she could attend the local high school (JA 57-8). After a "short period of time . . . , [Lorraine and Helen] dissolved [their] legal relationship" by mutual agreement (JA 58). "Lorraine was quite mixed up at this point . . ." (JA 59). She became pregnant with Renee and left New York briefly. Following her return, she saw Helen and twice visited her for "extended periods of time" (JA 59).

In 1974, when Lorraine was nineteen years old and Jonathan was twenty-two (JA 22), he visited his mother's home and met Lorraine again. They established a "good relationship" (JA 59). Shortly thereafter, Lorraine and Renee, then one and a half years old, moved in with Jonathan. Once prior to their living together and again once while they were cohabiting,

> "Lorraine tried to take her life. In both instances, hospitalization was required. At one point, Lorraine's emotional state was so severe that she had to be treated as an out-patient at a hospital." (JA 24).*

Jonathan and Lorraine lived together until 1976, during which time Jonathan "[took] on the role of a father towards . . . Renee" (JA 23-4, 59-60).**

* Lorraine denies being hospitalized for a "psychiatric condition" and admits only to out-patient clinic visits for depression following a miscarriage (JA 60-1). Jonathan agrees that she was treated at the hospital for her miscarriage but alleges that she was also "in an extreme emotional state" and was treated there for an apparent suicidal gesture (JA 214-5).

** The relationship was not continuous, and there appears to be some dispute as to how often and how long they lived apart during this period. Jonathan says that he "lived almost continuously with both Lorraine and her child, Renee, from the fall of 1974 until November 1976 . . ." (JA 22-3). Jonathan's mother says that during those two years, he and Lorraine "split for a short period of time and then lived together again . . ." (JA 60). Lorraine, however, says that "[i]n fact, I did not live with him for more than four months in any one stretch during the two years immediately prior to the birth of Jessica" (JA 146).

In 1976, Lorraine was twenty-one and Jonathan twenty-four years of age. She became pregnant, and they announced their engagement (JA 60-1). Lorraine acknowledged Jonathan as Jessica's father during her pregnancy and after the birth to Jonathan's mother and sister, at least two mutual friends, and her obstetrician (JA 25-6, 60-1). Lorraine asked the obstetrician to send his bill for Jessica's birth to Helen (JA 26).*

Throughout her pregnancy and after Jessica's birth, Lorraine had been receiving welfare payments. She "indicated" to Jonathan that she had "told" the local (presumably, Westchester County) social services department that he was Jessica's father (JA 26-7). In Family Court, Jonathan's counsel speculated that her application for welfare benefits probably required a sworn, written statement as to the identity of Jessica's father (JA 185).** Despite the local department's duty to seek support from Jonathan if it had in fact been given his name (SSL §§ 101, 102, 111-c [2][a], [d], 352-a[1][d]), Jonathan does not claim that the agency ever did so.†

Jonathan visited Lorraine and Jessica at the hospital on the first three days after Jessica's birth on November 9, 1976 (JA 27). He claims that Lorraine's "actions and words" led him to believe that his name was on Jessica's birth certificate (JA 27-8, 35),‡ but he does not allege requesting or consenting to the addition of his name to the cer-

* Jonathan's papers did not include copies of the bill. Neither his affidavit nor Helen's alleged that Helen actually received or paid such a bill.

** In fact, New York did not have any such requirement at the time of Jessica's birth on November 9, 1976. *See* p. 32 n. "*" *post.*

† In the adoption proceeding, Lorraine swore that she had not identified anyone as Jessica's father in a written, sworn statement (JA 136).

‡ Lorraine denies that she ever

> "by word or deed . . . represent[ed] to anyone that Jonathan Lehr's name was on Jessica's birth certificate. The subject never arose" (JA 251).

tificate, as would have been required under N.Y. Public Health Law § 4135.*

Following Lorraine's release from the hospital, she took the children and went to live with friends, without telling Jonathan where they had gone (JA 28).** At some point in the Spring of 1977, Lorraine contacted Jonathan. He visited her, Jessica and Renee four weekends in a row. Twice he saw only Renee because Lorraine would not allow him to see Jessica (JA 28-9).† At or after the fourth visit, Jonathan refused Lorraine's request that he marry her because he

> "could not make such a commitment at that time, either morally or financially, as he was still attending school and was unsure that marriage would be in the best interests of all concerned" (JA 29).

Lorraine refused to let him continue visitation (JA 29).

Shortly thereafter, Lorraine moved, concealing her whereabouts from Jonathan and his family. In August 1977, she married Richard. In August 1978, Jonathan learned her whereabouts (JA 30-1).‡ At times between her

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* The statute applies to births outside New York City. The provisions governing certificates for children born in New York City use virtually identical language to the State law. 22 N.Y.C. Administrative Code § 567-1.0(d), N.Y.C. Health Code § 201.05(b). Thus, the laws governing certificates for births anywhere in the State require the unwed father's written consent before his name can be listed.

** Jonathan claims that Lorraine "concealed her whereabouts" and that he was unable to learn them for approximately six months (JA 28). Lorraine says Jonathan "knew [her] whereabouts at all times (except for . . . a few weeks . . . in early 1977) . . ." (JA 146).

† Lorraine alleges that "neither time [that Jonathan saw Jessica] did he pay attention or show any interest in [her]" (JA 97).

‡ Lorraine asserts he not only knew where she was at all times during this period, he actually visited her several times that Spring (JA 146-8). Jonathan says Lorraine is confusing 1977 with 1978. He denies knowing her whereabouts "from the summer of 1977 . . .

(footnote continued on next page)

August 1977 marriage and November 1978, Lorraine spoke by telephone with Helen "with whom she had a very close relationship" (JA 31). In some of those conversations, Lorraine put Jessica on the telephone and had her refer to Helen as "Grandma" (JA 32).* Lorraine told Helen that she and Richard wanted to adopt Jessica but were reluctant to do so because their lawyer said they would have to notify Jonathan (JA 62-3). Jonathan offered financial assistance or a trust fund for Jessica on one of these calls,** but Lorraine refused (JA 32).

On December 12, 1978, Jonathan's attorney wrote to Lorraine asking to arrange "visitation with *your* daughter Jessica" (emphasis added) and suggesting legal action would be taken if the request could not be resolved "on an amicable basis." No mention was made of visitation with Renee (JA 15-6, 76).

On December 21, 1978, Richard filed petitions with the Ulster County Family Court to adopt Jessica, then two years old, and Renee, then six or seven years old, with Lorraine's consent (JA 17, 148). Jonathan did not become aware of the adoption proceeding for Jessica until March 3, 1979 (JA 17-8).

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to August of 1978 . . ." (JA 218). It appears that Jonathan learned Lorraine's whereabouts from one of her telephone conversations with his mother (JA 31), for he says he did not learn it from contacting her friends or from going to a detective agency (JA 30). Jonathan does not, it should be noted, indicate that he hired a detective agency, only that he "went to" one (JA 30).

* Lorraine alleges that both Renee and Jessica naturally called Helen "grandma" because Helen "was my lawful guardian and acted as my 'mother' " (JA 251).

** Lorraine denies ever having heard of, or refusing, a proposal that Jonathan set up a trust fund for Jessica. She notes that Helen had told her that she, Helen, was setting up such a trust fund for both Renee and Jessica. She asserts that

> "In any event, ever since Jessica's birth Mr. Lehr has not contributed a single cent to her support" (JA 251-2).

On January 8, 1979, Jonathan's attorney sent a second letter to Lorraine, requesting visitation with Jessica. This time he specified that legal action would be commenced in Family Court, Westchester County, unless she answered (JA 15-6, 77).

On January 15, 1979, the Ulster County Family Court held an adoption hearing at which Richard and Lorraine testified (JA 67). The court had already received a certificate confirming that no one had filed a notice of intent to claim paternity with the State's putative father registry (JA 114). Pursuant to DRL § 116, the court had ordered an investigation by the local (Ulster County) social services department. The department's report dealt solely with the adoptive family; "no contact was made with the putative father who is not identified in the report." JS App. C3: 102 Misc. 2d at 105. At the hearing, Lorraine submitted an affidavit listing the seven categories of persons then entitled to notice under DRL § 111-a* and specifically denying that any person was so entitled (JA 135-7).

On or about January 31, 1979, Jonathan commenced a proceeding for filiation and visitation in Westchester County Family Court. The summons was served on Lorraine by mail on February 21, 1979, returnable March 12, 1979 (JA 13-5). On February 26, 1979, the Ulster County Family Court issued an order, which Lorraine served by mail, staying the Westchester paternity proceeding, pending a hearing in Westchester on March 12, 1979, on a motion to change venue to Ulster County (JA 86-8). The supporting papers indicated that an adoption proceeding was pending and near conclusion in Ulster County but did not state its next return date (JA 91-2). Jonathan's counsel received the motion on March 3, 1979 (JA 17).

On March 7, 1979, Jonathan's attorney called the adoption court to advise the judge that he would be forwarding

* Chapter 575, Laws of 1980, added an eighth category. *See* App. A at p. 3a n. "*" *post.*

a motion to stay the adoption proceedings until the filiation and visitation proceeding was concluded (JA 19). At that time, the judge stated that although he knew of the pending paternity proceeding, he had granted the adoption petitions for her and Renee earlier that day. JS App. C4: 102 Misc. 2d at 106. (JA 19-20, 101-3). The adoption order was entered March 7, 1979, the same day it was issued (JA 69-70). Jessica was then two years, four months old and Renee, about seven years old. On March 29, 1979, the Westchester County Family Court denied Lorraine's venue motion (JA 21, 165). On April 23, 1979, without having moved formally to intervene in Jessica's adoption proceeding, Jonathan filed a Notice of Appeal from the adoption order. JS App. A6 n. 3: 54 N.Y.2d at 424 n. 3. On April 24, 1979, this Court issued its decision in *Caban* v. *Mohammed*, 441 U.S. 380. On June 20, 1979, the Westchester County Family Court dismissed, without prejudice, Jonathan's paternity proceeding.*

Two days later, on June 22, 1979, Jonathan commenced the instant litigation, making his first actual appearance, through counsel, in Ulster County Family Court. He petitioned to vacate the adoption proceeding on the grounds of fraud and unconstitutionality (JA 5-6) and argued that DRL §§ 111, 111-a, were unconstitutional because under them he was not entitled to, and did not receive, notice of the adoption proceeding, an opportunity to appear and the right to withhold consent to adoption (JA 39-46).**

* The court dismissed because once an adoption order was granted, it severed any parental relationship a paternity petitioner might be seeking to establish (JA 227-8). Also, visitation, the relief Jonathan sought, could not be ordered in view of the adoption, making the proceeding "an exercise in futility over which this court will not entertain jurisdiction" (JA 228).

** On this appeal, Jonathan concedes that he was not eligible for notice under either DRL § 111 or § 111-a as they stood in 1979 (Brief pp. 75-6) and that he was not made eligible by the 1980 *Caban* amendments to DRL § 111 (Brief p. 18 n. "*"). He thus has abandoned the argument of his reply papers in Family Court that he might be eligible for notice under DRL § 111-a because he allegedly came within the scope of those persons intended to be covered by the statute (JA 179-84), if not those literally covered by it.

D. Decisions

1. Family Court

The Family Court rejected appellant's arguments that he was entitled to notice, pointing out that Jonathan conceded that he did not qualify under DRL § 111-a and was challenging the constitutionality of DRL §§ 111, 111-a, for the very reason that he was not covered. JS App. C6: 102 Misc. 2d at 107. As a matter of discretion, Judge Elwyn declined to order notice be given Jonathan pursuant to DRL § 111(3). Jonathan had not tried to intervene in the adoption proceeding or requested notice of it. His consent was not required under then governing precedent (citing *Matter of Malpica-Orsini*, 36 N.Y.2d 568, *app. dsmd. sub nom. Orsini* v. *Blasi*, 423 U.S. 1042 [1976]). Nor was notice necessary under the more specific notice statute, DRL § 111-a. JS App. C6-13: 102 Misc. 2d at 107-11.

Judge Elwyn found Lorraine and Richard had no duty under the statutes to serve Jonathan or to disclose his claims to the adoption court (JS App. C6-10, C14-7: 102 Misc. 2d at 107-8, 112-3) and therefore did not commit a fraud on the court by not making disclosure. JS App. C17: 102 Misc. 2d at 113-4. In any event, the existence of his claim to be the father and his allegations about Lorraine's mental and emotional instability were irrelevant to the central concerns of the adoption proceeding, that is, "the character and fitness of the adoptive parent" and whether the adoption would be in the child's best interests. JS App. C5, C18-20: 102 Misc. 2d at 106, 114-5.

After extensive review of the legislative history of DRL § 111-a, Judge Elwyn found that the State had a legitimate purpose in enacting it and that the categories of putative fathers established were reasonable, rational and not arbitrary. JS App. C22-4: 102 Misc. 2d at 116-8. He interpreted this Court's decision in *Caban* as declaring DRL

§ 111(1)(c) unconstitutional in all cases but held that *Caban* should be denied retroactive effect here. JS App. C20-1, C27-32: 102 Misc. 2d at 115-6, 120-2.*

2. Appellate Division

Jonathan appealed from the Family Court's order (JA 258). The Attorney General cross-appealed from so much of the order as held DRL § 111(1)(c) unconstitutional "under the facts and circumstances of this case." Notice of Appeal dated December 28, 1979. During the briefing of the appeals, the Legislature enacted Chapter 575 of the Laws of 1980, amending DRL §§ 111, 111-a, as of July 26, 1980.

In an opinion by Justice Greenblott with Justice Mikoll dissenting, the Appellate Division, Third Department, affirmed. Noting that Jonathan did not contend that he fell within the seven categories of DRL § 111-a as it stood in 1979, the majority held that the statute must be strictly complied with. Jonathan "could have insured his right to notice" by filing a notice of intent to claim paternity with the putative father registry. JS App. B3: 77 A.D.2d at 383. He failed to do so and his commencement of a paternity suit was not the equivalent of such a filing. The Appellate Division found no constitutional infirmity in DRL § 111-a. *Ibid.*

As for the effect of *Caban* on Jessica's adoption, the majority found that reliance of countless adoptive families on pre-*Caban* law precluded its retroactive application on a motion "made nearly two months after the *Caban* decision

* The Family Court interpreted the Court of Appeals' remand of *Matter of David A.C.*, 47 N.Y.2d 880 (1979), in light of *Caban* as an indication that *Caban* was generally to be given retroactive effect. (In fact, *David A.C.* was *Caban* on remand from this Court.) It distinguished *Caban* and denied it retroactive effect to the case at bar because the father in *Caban* had raised the constitutional issues as a party in the Surrogate's Court before the adoption was approved, while Jonathan entered the present case only after the adoption order was signed, and because of the trauma to the entire adoptive family that applying *Caban* would cause. JS App. C27-32: 102 Misc. 2d at 120-2.

and approximately three and one-half months after the adoption order became final." JS App. B3: 77 A.D.2d at 383.

In dissent, Justice Mikoll argued that the "spirit and intent" of DRL § 111-a(2)(c) as a response to *Stanley* v. *Illinois*, 405 U.S. 645 (1972), required the provision be read to encompass a person who indicates his intent to claim paternity by filing a paternity petition. Failure to give Jonathan notice thus violated the statute and the Due Process Clause. JS App. B5-6: 77 A.D.2d at 384-5. She also suggested that in view of the Family Court's knowledge of the paternity petition, the failure to order notice of the adoption proceeding might have been an abuse of discretion. JS App. B6: 77 A.D.2d at 385. Tacitly, she concurred in denying *Caban* and Chapter 575 retroactive effect.

3. Court of Appeals

The Court of Appeals majority and dissenters agreed in denying *Caban* retroactive effect in general and as to this case. Speaking for the majority, Judge Jones noted that (JS App. A5: 54 N.Y.2d at 423):

> "the case . . . involves an attempt, in an independent proceeding, by one who was not a party to a judicial proceeding which has been concluded to mount a direct attack on the final determination made therein. It is to be distinguished from the more frequently encountered attempt of one who was a party to a judicial proceeding which concluded in a disposition adverse to him, to enlist the aid of the courts to vacate or modify that disposition by means other than direct appellate review."

The adoption proceeding in this case had been over nearly seven weeks when *Caban* was announced. The court concluded that Jonathan's purported appeal from the adoption proceeding did not serve to keep it in the appellate process so that *Caban* would apply, for the appeal was of question-

able validity and never perfected. JS App. A6 & n. 3: 54 N.Y.2d at 424 & n. 3. In any event, it noted that this proceeding was "a post-termination attack" on an adoption proceeding that "was completed with the entry of its order" prior to *Caban* "and whose judicial life had then expired. . . ." JS App. A6: 54 N.Y.2d at 424. The majority declined (*ibid.*):

> "[t]o accord full retroactive effect to *Caban* . . . (and thus to allow its doctrine to be invoked on applications attacking adoption proceedings long since finally concluded) [because to do so] would be, as the dissenters in *Caban* implied (441 U.S. 380, 401, 415-6), to work cruel havoc."

Caban would therefore be applied to cases still in the judicial process and to new ones, but not to completed adoptions or independent, collateral attacks on them. JS App. A6: 54 N.Y.2d at 424. Speaking for the dissenters in the court below, Chief Judge Cooke noted that (JS App. A13-4: 54 N.Y.2d at 431-2):

> "[t]here is no quarrel here with the majority's conclusion that *Caban* . . . should not be given retroactive effect to an adoption proceeding concluded prior to that decision."

The court below divided as to whether the Family Court had abused its discretion, in part because the judges came to different conclusions as to Jonathan's constitutional rights under pre-*Caban* law. The majority found no abuse of discretion, given what the Family Court Judge knew when he signed the adoption order and when he refused to vacate the order and reopen the adoption proceeding. At the time of the signing, the trial court had all the statutory elements before it to approve the adoption (including the necessary parties, the natural mother's consent, and a favorable investigative report) and was satisfied Jessica's best interests would be promoted by the adoption. JS App. A7-8: 54 N.Y.2d at 425-6. The court noted that appellant

did not claim to have come within the categories of persons entitled, under the 1979 versions of DRL §§ 111, 111-a, to notice of the proceeding or to withhold consent to the adoption. *Ibid.* Moreover, it explained that under pre-*Caban* law (JS App. A8: 54 N.Y.2d at 426):

> "[t]here was then no reason to consider any possible rights that [appellant] might have inasmuch as our court, and apparently the Supreme Court, had recently declared that he had none (*cf. Matter of Malpica-Orsini*, [*supra*])."

The majority analyzed appellant's fraud claims as relying ultimately on an argument that Lorraine had some duty to tell the adoption court who Jessica's natural father was and to inform it of his existence. The court rejected this argument, holding that she had no such duty. There was no reason, the court concluded, to believe she did not answer fully all the questions asked her in the adoption proceeding. In any event, the Family Court did know of Jonathan's existence and claims. JS App. A8-9: 54 N.Y.2d at 426-7.*

Appellant could, in the Family Court's discretion, have been given notice pursuant to DRL § 111(3). JS App. A9: 54 N.Y.2d at 427. To have given him notice simply because the adoption court had actual knowledge of his claim to be Jessica's father would, the majority ruled, be wrong for three reasons. First, giving notice to all putative fathers of whose claims the hearing judge had actual knowledge would "in effect be superimposing a judicial amendment on" the putative father notice statute, DRL § 111-a(2), although the Legislature had carefully selected limited, objective categories and had (JS App. A9-11: 54 N.Y.2d at 427-9):

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* Jonathan had also claimed that the adoption was granted in violation of DRL § 116's six month residency requirement. The court below rejected the claim because subdivision (1) of DRL § 116 contains a specific exemption for when, as here, the child is being adopted by the spouse of the natural parent and has been living with the natural and adoptive parents for more than six months. JS App. A9: 54 N.Y.2d at 427. Jonathan appears to have abandoned the waiting period claim on this appeal.

> "determin[ed] not to include such putative fathers within the scope of section 111-a."

Second, giving notice to appellant solely because the trial court knew of his existence (JS App. A10 n. 6: 54 N.Y. 2d at 428 n. 6):

> "might be mischievous in affording a substantive basis for an argument (not unlike that made by [appellant] here) that, inasmuch as knowledge of the adoption court of the existence of a putative father would confer legal rights on him, the failure of the natural mother (who could be expected to know his identity) to identify him to the court should be classified as the perpetration of a fraud on the court in consequence of concealment from it of a material fact."

Third, DRL § 111-a(3) specifies that the purpose of DRL § 111-a notice is to allow the putative father "to present evidence . . . relevant to the best interests of the child." Every putative father "could claim[] . . . that he was in a position to give background information." JS App. A11: 54 N.Y.2d at 429. There was nothing in the record before "the Family Court Judge suggesting that appellant was different from any other putative father", or from any "of whom the adoption court might have actual knowledge", or that he could "furnish any particular or special information as to Jessica's best interests" with respect to her adoption by Lorraine's husband. JS App. A10-1: 54 N.Y.2d at 428-9 (footnote omitted).

The court also noted that with the benefit of hindsight, one might wonder, given the "brevity of the time intervals" between the events leading up to the signing of the adoption order, and the "unanticipated . . . [,] substantial[]" expansion of "[putative fathers'] legal rights" caused by *Caban*, whether signature "would not have been better . . . postponed until notice had been given to [appellant]." JS App. A11: 54 N.Y.2d at 429. But the court concluded that, on the record before the Family Court, signing the order (JS App. A12: 54 N.Y.2d at 430) (footnote omitted):

> "would have clearly appeared to be the only prudent course of action to have followed in the best interests of Jessica . . ."

Moreover, long before the adoption order was signed, appellant could have filed notice of his intention to claim Jessica's paternity with the Statewide putative father registry pursuant to SSL § 372-c. Doing so (JS App. A12 n. 7: 54 N.Y.2d at 430 n. 7):

> "would have assured him the right which he sought to participate in the adoption proceedings ([DRL § 111-a (2)(c)]). Additionally, . . . he could have made a prompt application to intervene in the adoption proceeding once notice of its pendency was brought to his attention (CPLR 401, 1012, subd. [a]; 1013)."

As a separate matter, the majority found no abuse of discretion in the Family Court's denial of appellant's present application to reopen the adoption proceeding. First of all, Jonathan's tender of proof as to Lorraine's background did not "directly bear[]" on the central legal question in the adoption proceeding, Jessica's best interests. JS App. A12: 54 N.Y.2d at 430. Second, the evidence appellant offered might have been relevant if he had sought custody, but he "has never sought more than rights of visitation". *Ibid.* Third, if the proceeding were reopened, it would have given Jonathan the substantive, unreviewable right, which he would not otherwise have had, to prevent an adoption that was in Jessica's best interests. JS App. A13: 54 N.Y.2d at 431.

Agreeing that *Caban* does not apply retroactively here, Chief Judge Cooke went on to observe for the dissenters that (JS App. A14: 54 N.Y.2d at 432):

> "[t]he decision of the Supreme Court in [*Caban*], however, does not resolve all of the issues presented on this appeal. Under pre-*Caban* law, it was recognized that a putative father is entitled at least to notice

> and an opportunity to be heard concerning whether adoption would be in his child's best interests (*see Quilloin* v. *Walcott*, 434 U.S. 246 [1978]; *Matter of Malpica-Orsini*, [*supra*]; *Doe* v. *Department of Social Servs. of City of Poughkeepsie*, 71 Misc. 2d 666 [Dutchess Sup. 1972] . . .)."

The fact that appellant did not come within DRL § 111-a's guidelines did not, according to the dissent (JS App. A15: 54 N.Y.2d at 433), "justify the failure to give [discretionary] notice" under DRL § 111(3) where

> "the father's existence and his assertion of an interest in the child are actually known by the court hearing the adoption petition . . . ."

In such a case, "[s]lavish adherence to the 'statutory guidelines' . . . cannot have been intended by the Legislature." *Ibid.* The natural mother's privacy interests arguably protect her from being compelled to disclose the father's name, thus precluding a claim of fraudulent concealment of material facts if she does not name him. In any event (JS App. A15 n. 2: 54 N.Y.2d at 439 n. 2):

> "[r]ecognizing an obligation on the part of the court to act on facts before it simply does not require recognizing an obligation to disclose on the part of the mother."

The dissent also concluded that while Jonathan could have filed with the putative father registry, until he received notice of the adoption proceeding, he "had no reason to suspect that his rights were going to be terminated." JS App. A16: 54 N.Y.2d at 434. Since the purpose of the registry is to "assure[] that knowledge of the father's existence can be readily ascertained," requiring such filing is "meaningless" when the adoption court independently has actual knowledge of the father. JS App. A17: 54 N.Y.2d at 435. The dissenters argued that a hearing on the adoption order itself was necessary to determine if Jonathan's lack of a

substantial familial relationship with Jessica is due to his lack of interest or to Lorraine's concealment of herself and the children, and if the latter, whether he is entitled to have his consent found necessary for adoption. JS App. A17 n. 4: 54 N.Y.2d at 435 n. 4. At the same time, the dissenters suggested that a hearing to weigh the adequacy of Jonathan's evidence as to best interests was *not* necessary on the application for vacatur. His claim was to vacatur as a matter of right since he was denied a hearing on the adoption order itself. JS App. A18 n. 5: 54 N.Y.2d at 436 n. 5.

Summary of Argument

Jessica is the illegitimate child of Lorraine. After Lorraine married Richard, he petitioned, with Lorraine's consent, to adopt Jessica.

Jonathan claims to be Jessica's natural father. Although he lived with and was engaged to Lorraine, Jonathan never supported her, even while she was pregnant with Jessica and allegedly receiving public assistance. Subsequently, he refused to marry her because he "could not make such a commitment . . . , either morally or financially . . ." (JA 29). Jonathan saw Jessica only in the hospital immediately after her birth and on two occasions a year later. His name does not appear on Jessica's birth certificate. He did not himself help with the expenses of her birth. He claims to have offered child support but has never actually provided support or sent Jessica any gifts. Nor has he taken any of the steps he could have, even over Lorraine's objection, to assure Jessica's financial security. He did not take advantage of New York's putative father registry to register his intention of acting as a father. Only after learning that Richard was considering adoption, did he engage an attorney and seek visitation and an order of paternity. He did not seek custody. Even after receiving notice of the actual adoption proceeding, he failed to take advantage of available New York procedural remedies to seek to intervene as a party in it.

Jonathan would now overturn Richard's adoption of Jessica by means of a post-judgment, collateral attack. At the time the adoption was completed, the governing case-law was *Matter of Malpica-Orsini*, 36 N.Y.2d 568, *app. dsmd. sub nom. Orsini* v. *Blasi*, 423 U.S. 1042 (1976). Under *Orsini*, no substantial federal question is presented by Jonathan's claim that he had a due process or equal protection right to veto Jessica's adoption.

Jonathan's claim to a right to notice of the adoption proceeding in order to offer evidence as to Jessica's best interests ignores his failure to take advantage of the putative father registry, by which he would automatically have received notice, or of the actual notice he received, which gave him an opportunity to seek to intervene. Under the circumstances, it was not an abuse of discretion for the adoption court, having before it the adoptive family and expert reports on Jessica's present circumstances and best interests, to determine not to give Jonathan discretionary notice. Neither his fitness nor Lorraine's was in question since there would not be a change in custody even if the adoption were denied. The mere fact that he belatedly claimed paternity was no indication that he had any particular or special information to add to the reports before the adoption court and the court's personal observations. In fact, the evidence he eventually offered, nearly four months after the adoption was completed, was irrelevant to the suitability of Jessica's adoption by Richard, a person he did not know.

New York's adoption statutes, Domestic Relations Law §§ 111, 111-a, as they stood at the time of the adoption and as subsequently amended, adequately protect the rights of unwed fathers. The putative father registry is a readily available, non-judicial means for such fathers to register their interest. Jonathan had, through his attorney, notice of its availability. The alternatives proposed on this appeal—automatic notice when a paternity claim is filed anywhere in the State, whether or not the adoption court knows

of the claim; forcing the mother to disclose the identity of the natural father; or requiring the court to notify an alleged father whose name it knows, whether or not he is believed to be the actual father, can be found or is likely to have relevant information as to the child's best interests—pose constitutional and practical problms and were reasonably rejected by the Legislature.

Jonathan claims that this Court's decision in *Caban* v. *Mohammed*, 441 U.S. 380 (1979), gives him the right to veto Jessica's adoption. But the decision itself clearly shows that it was not to have retroactive effect on collateral proceedings, such as this, whose judicial life had expired when *Caban* was announced. Even if *Caban* were retroactive, it would not help Jonathan because it is a narrowly written decision applicable only to unwed fathers who have established substantial familial relationships. Jonathan failed to take the affirmative steps available to him (*e.g.*, filing with the putative father registry, intervention in the adoption proceeding, assuring Jessica's financial security) to establish such a familial relationship.

ARGUMENT

POINT I

Since appellant failed to take advantage of the notice and opportunity he had to appear in the adoption proceeding and since he had no right at that time to anything more under this Court's rulings, his claims on this appeal do not present a substantial federal question.

The Court lacks jurisdiction over this appeal under 28 U.S.C. § 1257(2) because the judgment below of the New York Court of Appeals does not involve a substantial federal question.

With respect to appellant's claimed right to veto power over his alleged child's adoption, at the time of Jessica's

adoption,* the governing case-law was that no substantial federal question was presented by a ruling that a natural father who lived with his child and her mother for nearly two years after her birth, who was adjudicated the father, ordered to pay support and awarded visitation rights, and who intervened in the adoption proceeding, had no due process or equal protection right to have his consent required for the adoption. *Orsini* v. *Blasi*, 423 U.S. 1042, *dsmg. Matter of Malpica-Orsini*, 36 N.Y.2d 568, 569 (1976). Moreover, this Court had held that an unwed father seeking visitation, not custody, did not have to be found unfit before his child could be adopted over his objection, if the adoption formalized a family unit in existence and was in the child's best interests. *Quilloin* v. *Walcott*, 434 U.S. 246 (1978). In the present case, Jonathan has never lived with or supported Jessica. He only took affirmative legal steps to establish a relationship with her after he learned that she might be adopted. He seeks visitation, not custody. *See* pp. 7-9 *ante*.

Nor was there a substantial federal question with respect to appellant's right to notice and opportunity to testify as to Jessica's best interests. Jonathan could have availed himself of the putative father registry, an easy, inexpensive, non-judicial procedure, to assure himself of notice and an opportunity to appear. *See* pp. 26-7 *post*. He did not. Moreover, Jonathan did receive notice of the adoption proceeding from Lorraine's counsel. *See* p. 8 *ante*. The fact that the adoption order was signed soon thereafter did not deprive him of an adequate opportunity to take advantage of that notice, for he could have moved to intervene as soon as he learned of the adoption proceeding or within a reasonable time *after* the order was filed, possibly even after the time for appeal had run out. *See* p. 39 *post*. Instead, he filed an untimely appeal, without inter-

* Since the majority and dissenters in *Caban* did not disagree on the proposition that the decision was not retroactive (*see* p. 40 *post*), no substantial question is posed by appellant's claim here (Brief p. 30) that *Caban* applies to him.

vening, and then failed to perfect it. Since he did receive notice and opportunity to intervene but failed to capitalize on them, he lacks standing to complain that the statutes do not provide those rights to other fathers (*see H.L.* v. *Matheson*, 450 U.S. 398, 406 [1981]), and no substantial federal question can be presented by his claim.

POINT II

Domestic Relations Law § 111-a, which codifies case law as to interested putative fathers entitled to notice of adoption proceedings, establishes reasonable categories under the Equal Protection and Due Process Clauses.

Appellant alleges that DRL §§ 111, 111-a, are violative of equal protection and of procedural and substantive due process. Point III *post* will discuss DRL § 111 and the question of consent to adoption. This Point will discuss DRL § 111-a and the question of notice of adoption proceedings. Argument in this section of the brief turns on whether any somewhat formal acknowledgment of paternity entitles the father to notice or whether the State can require certain kinds of acknowledgment.

A. The classifications of interested putative fathers in DRL § 111-a satisfy equal protection.

The court below had recognized in *Matter of Malpica-Orsini*, *supra*, 36 N.Y.2d at 577, that an adjudicated unwed father who took steps to be heard as to the adoption of his alleged child was entitled to notice under DRL § 111. The Legislature subsequently set out seven* guidelines in DRL § 111-a as to which unwed fathers should automatically be given notice of an adoption. The guidelines were intended to give an unwed father "a simple means of expressing [his] interest" (App. B at p. 25a *post*: A.G. App. 6) if the

* An eighth guideline was added in 1980. *See* App. A at p. 3a *post*.

mother did not acknowledge it. The guidelines were based on a study of foster care and adoption practices in New York and other States (App. B at pp. 23a-24a: A.G. App. 4-5). Broader guidelines, which might have covered Jonathan, were considered and rejected because it was "impractical . . . [to] require attorneys for adoptive parents to search 62 county clerk's offices" for acknowledgments—or for any one of a variety of different types of legal actions, including paternity petitions, declaratory judgment complaints, literally thousands of writs of *habeas corpus*, foster care status review petitions, etc., in the New York Supreme, Family and Surrogates' Courts, as well as in the courts of other States. Moreover, a "truly concerned" father could instead file a notice of intent to claim paternity with the Statewide putative father registry (App. B at pp. 34a-35a: A.G. App. 19). Suggestions for narrower guidelines were also rejected (App. B at pp. 33a, 38a-39a *post*: A.G. App. 18, 32-3). The guidelines established were designed (App. B at pp. 23a-26a, 30a-33a *post*: A.G. App. 4-6, 14, 16-8) to be consistent with *Stanley* (405 U.S. at 650 n. 4; Mr. Stanley satisfied DRL § 111-a[2][e] since he was "openly living with the child . . . at the time the proceeding [was] initiated and [was] holding himself out to be the child's father") and *Matter of Malpica-Orsini* (36 N.Y.2d at 569; Mr. Orsini satisfied DRL § 111-a[2][a] since he was "adjudicated by a court in this state to be the father of the child"). As it developed, the guidelines were also met in *Caban* (441 U.S. at 382; Mr. Caban satisfied DRL § 111-a[2][d] since he was "recorded on the child's birth certificate as the child's father").

The "wisdom, propriety or even correctness" of the categories finally adopted is not open to judicial review, particularly in view of the Legislature's extensive investigation. *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 49 n. 2 (1975). *See James* v. *Strange*, 407 U.S. 128, 133 (1972); *People* v. *Broadie*, 37 N.Y.2d 100, 117-8 (1975). In the instant case, there were rational reasons for not providing

for notice to the category of persons filing judicial actions and such persons have an easy administrative means of ensuring they receive notice. *See* p. 21 *ante*, pp. 26-7 *post*.

The existence of categories for unwed fathers and not for mothers does not violate equal protection. There is no comparable need for such guidelines for unwed mothers since the fact of bearing a child to term demonstrates significant interest, particularly given the availability of abortion. *Caban* v. *Mohammed*, *supra*, 441 U.S. at 398-9 (*Stewart*, J., dissenting); *id.* at 404-5 (*Stevens*, J., dissenting); *Stanley* v. *Illinois*, *supra*, 405 U.S. at 665-6 (*Burger*, C.J., dissenting). *See W.E.J.* v. *Superior Court of Los Angeles*, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862, 869 (Ct. App. 1979). Moreover, it is "a fact of nature [that] the mother is present at birth [and] the maternal parentage is unquestioned. . . ." *State* v. *Hill*, 91 Wis. 2d 446, 283 N.W.2d 451, 453 (1979). Also, experience and public policy support a statutory presumption of parentage for husbands that is not available in determining the paternity of illegitimate children. *Ibid.* *See, e.g.*, DRL § 175. Accordingly, there is a significantly greater problem in proving paternity than maternity. *Lalli* v. *Lalli*, *supra*, 439 U.S. at 268-9; *Stanley* v. *Illinois*, *supra*, 405 U.S. at 665 (*Burger*, C.J., dissenting).

In view of the importance of the familial and property rights involved, the State may legitimately condition an unmarried father's assertion of those rights (including the right to object to adoption) "upon his showing that it is in fact his child." *Caban* v. *Mohammed*, *supra*, 441 U.S. at 393 n. 15.* The Equal Protection Clause does not demand

* One of the deficiencies *Caban* noted in DRL § 111 was that adjudicated unwed fathers had no right to object to adoption. *Ibid.* Following Chapter 575 of the Laws of 1980, such fathers have the opportunity to establish their right to object pursuant to renumbered DRL § 111(1)(d)-(e). *See* App. A at p. 1a n. "**" *post*. Even prior to *Caban*, adjudicated fathers received notice pursuant to DRL § 111-a(2)(a-(b).

that the use of categories be abandoned for a case by case approach to determining whether a proper showing has been made, even though some interested unwed fathers may occasionally not receive notice. *See Lalli* v. *Lalli, supra,* 439 U.S. at 272-3; *Matter of Ginnan,* 101 Misc. 2d 853, 861-2 (Steuben Fam. 1979). Moreover, the availability of DRL § 111(3) discretionary notice provides a "safety valve" for consideration of individual cases deserving of notice although without the categories. *See* pp. 30-1 *post.*

B. The notice provisions of DRL §§ 111(3), 111-a, and the Statewide putative father registry satisfy procedural due process.

1. Standard of review

In reviewing procedural due process claims, the Court has applied a three-pronged analysis. *See, e.g., Santosky* v. *Kramer,* —— U.S. ——, 102 S. Ct. 1388, 1396-7 (1982). The test was summarized in *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976), as follows:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Analysis of the private interest involved herein shows that Jonathan failed to take steps to establish a familial relationship or even to protect his legal rights when he could have done so and proposes now to disrupt the family unit in which the child is living. Under *Quilloin* v. *Walcott, supra,* 434 U.S. at 255, he has no interest deserving of procedural or substantive due process protection. *See* pp. 43, 45-8 *post.*

2. Ease and convenience of DRL § 111-a and putative father registry

Assuming *arguendo* that petitioner has a protectible right, DRL § 111-a and the putative father registry provide adequate safeguards for it. To file a notice of intent to claim paternity an unwed father need only mail his name and address and such information as he has about the mother and child to the putative father registry. No special expertise is necessary to make a filing, nor is any particular form mandated for the filing. A person commencing a paternity proceeding might simply forward a copy of the petition. He need not do anything except keep his address up to date. See SSL 372-c(1)-(2). The expense is that of a first class letter.

By filing with the registry, he becomes entitled to notice of the adoption proceeding and must be served if notice can possibly be given. *See Matter of Sally Janet R.*, NYLJ February 9, 1981, p. 13, col. 6, at p. 14, col. 1 (Bronx Surr.). *Cf. Matter of Marilyn H.*, 106 Misc. 2d 972, 974 (N.Y. Co. Fam. 1981). If the natural mother has not revealed his identity, or even if she has done so but did not have enough information to locate him, his filing with the registry computer will ensure the adoption court is informed he exists and where he can be served.* If by design or chance his existence is not discovered before the adoption is granted, he could move to re-open based on newly discovered evidence (DRL §§ 111-a[7], 114) without facing the possibly

* The registry may be the only method of locating the father when the mother has died and did not know or did not reveal the father's identity. *See, e.g., Matter of Carmen Lydia S.*, 106 Misc. 2d 770, 771, 773 (Bronx Surr. 1981) (deceased mother said she "had no idea [as] to the identity of the child's father since she was under the influence of drugs at the time of conception . . . [There are] countless cases where the putative father is unknown. . . ."); *Matter of John Robert A.*, NYLJ March 1, 1982, p. 14, col. 5 (Bronx Surr.) (deceased mother knew only "a possible surname for her alleged rapist and . . . believed he resided in the borough of Queens.").

fatal barrier of showing fraud on the court. *See* JS App. C17-8: 102 Misc. 2d at 113-4. The registry is thus an effective answer to the problem of secrecy of which Jonathan complains (Brief pp. 8, 95-6).

3. Knowledge of the registry's availability

Appellant argues (Brief p. 63) that DRL § 111-a is unconstitutional for failure to provide adequate notice since some putative fathers may not know about the registry.* But the same could be said of any statutory alternative the Legislature might provide. Someone will always not know of it. Procedural due process evaluates statutes "as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge, supra,* 424 U.S. at 344. Moreover, asserting ignorance is easy and disproving it difficult. For the most part, therefore, ignorance is not an excuse under the law.**

Furthermore, a putative father seeking to establish legal rights to his child is likely to consult a lawyer. Jonathan did. And a lawyer presumptively "ha[s] the means

* The statistics cited by proposed *amicus curiae* Community Action for Legal Services (Brief p. 14) show only that relatively few fathers have themselves filed with the registry. The number registered bears no necessary relation to the number who know of the registry or to the number interested in ensuring legal recognition for an out-of-wedlock parental relationship. Data are lacking but observation of the courts indicates that the 600 voluntary registrations over the past five years far exceed the number of filiation proceedings initiated by men over that period. Moreover, there is every reason to believe that a substantial proportion of adjudicated fathers were aware of the registry. They may not have registered because they did not want to act as fathers, because they were avoiding child support obligations (the fact of voluntarily filing can be used against a father in establishing his support obligations, *see* SSL § 372-c[4]), or simply because they were willing to wait and let the court clerk do the filing pursuant to Judiciary Law § 254.

** As Lorraine's attorney said, *"Ignoratia legis neminem excusat."* (JA 129).

and the knowledge, or at least the ability to obtain the knowledge," to evaluate legal claims and to devise strategy for enforcement. *See Harbulak* v. *County of Suffolk*, 654 F.2d 194, 198 (2d Cir. 1981).* The lawyer, and through him, his client, can thus be charged with knowledge of the registry. *Farr* v. *Newman*, 14 N.Y.2d 183, 187 (1964).

Assuming *arguendo* that Jonathan in fact did not know of the registry before he consulted counsel (JA 36 n. 8), the letters from his attorney asking for visitation demonstrate that no later than December 12, 1978, Jonathan did know where Lorraine and Jessica were and had retained an attorney. *See* JS App. A12 n. 7: 54 N.Y.2d at 430 n. 7. At that time, prudent counsel would have advised filing with the putative father registry as a protective measure. Indeed, at that time the attorney would presumably have considered possible defenses he might face to his request and would have anticipated adoption, since adoption had allegedly been mentioned in Lorraine's telephone conversations in Fall 1978 (JA 62-3), and since adoption usually cuts off visitation rights, at least in the absence of a stat-

* For instance, the index for each yearly edition since 1976 of the commonly used *Family Law Yellow Book, Bender Pamphlet Edition*, containing the DRL, FCA, SSL and selected related statutes, has had the following entry:

"PATERNAL RIGHTS

"Notice in certain proceedings on out-of-wedlock children . . . SSL 384-c, DRL 111-a

"Putative father registry . . . SSL 111-b, 372-c".

This entry immediately precedes the one for "PATERNITY PROCEEDING".

There are references to the putative father registry in the statutes which an attorney—or lay person—would be likely to consult in considering the rights and duties of an unwed father. DRL § 111-a (2)(b)-(c) is, of course, in the DRL article on adoption. Other references are in the statutes dealing with foster care for children and termination of parental rights, SSL § 384-c(2)(h), and with the inheritance rights of illegitimates, N.Y. Estates, Powers and Trusts Law § 4-1.2(a)(2)(b)(ii).

ute.* Certainly, Jonathan and his attorney had to have been, or at least should have been, aware of that possibility no later than March 3, 1979, when Lorraine's papers arrived citing the pending adoption proceedings as a ground for staying action on his request for visitation (JA 91-3). A brief review of the law in December 1978 or on March 3, 1979, would quickly have shown how easy and important it is to file with the registry. By registering, he would have saved himself the order to show cause for a stay and the present collateral proceeding, *see* pp. 8-9 *ante*, and still have "assured [himself] the right which he sought to participate in the adoption proceedings . . ." JS App. A12 n. 7: 54 N.Y.2d at 430 n. 7.

Appellant had actual or constructive knowledge of the putative father registry. Through his attorney, he had notice of the adoption proceeding and an opportunity to appear. He cannot complain over the lack of procedural safeguards that he had in fact or available to him and failed to take advantage of. Nor can he overturn Jessica's adoption because other putative fathers may not know of

* Visitation can be ordered even over the adoptive family's objections if there is a specific statute. *People ex rel. Sibley* v. *Sheppard*, 54 N.Y.2d 320 (1981) (visitation by natural grandparent pursuant to DRL § 72). Despite the absence of a statute, visitation has been granted to an adoptive child's siblings. *See, e.g., Matter of Patricia A.W.*, 89 Misc. 2d 368, 378-80 (Kings Fam. 1977). With respect to a natural parent, however, adoption specifically deprives him of parental rights over the child, DRL § 117, including the right to enforce visitation, DRL § 70, FCA §§ 651, 652, 656(b). Visitation with a natural parent after termination or adoption can and has been ordered, but as a matter of discretion and with the adoptive parent's consent. *See Matter of Gerald G.G.*, 61 A.D.2d 521, 525-6 (2d Dept. 1978), *app. dsmd.* 47 N.Y.2d 1036 (1979); *Matter of Raana Beth N.*, 78 Misc. 2d 105 (N.Y. Co. Surr. 1974). *See, e.g., Matter of Juan R.*, Dkt. No. G-62-79 (Monroe Fam. January 16, 1980) (order terminating natural mother's parental rights but mandating she be allowed visitation until and after adoption); *Matter of Tammy Ann A.*, Dkt. No. G 51/54-77 (Monroe Fam. April 9, 1981) (order terminating parental rights to two children and authorizing continued visitation between the natural parents and the first child at the child's discretion and between them and the second child "in a manner that will not disturb [her] or [her foster parents'] household").

the registry or may not receive notice and an opportunity to appear under the statutes, for he lacks standing to assert their rights. *See H.L.* v. *Matheson, supra,* 450 U.S. at 406. *See* p. 22 *ante.*

4. DRL § 111(3) as a "safety valve"

The case by case "safety valve" of DRL § 111(3) provides flexibility to DRL §§ 111, 111-a, and removes any suggestion of arbitrariness or lack of facial constitutionality under due process. *See FCC* v. *WNCN Listeners Guild,* 450 U.S. [illegible], 601 n. 44 (1981) (*White,* J.); *id.,* 450 U.S. at 609 (*Marshall,* J., dissenting). As the majority below held (JS App. A10-1: 54 N.Y.2d at 428-9), in determining whether to give discretionary DRL § 111(3) notice, the adoption court should consider what additional, relevant information the putative father might have that the court does not.*

By the end of the adoption proceeding, the court has reviewed the detailed expert investigation report (DRL § 116[3]), and has personally examined the adoptive child and adoptive parent. DRL § 115(3).** Where, as in this case, the putative father only sought visitation and the adoptor would be the natural mother's husband, whatever evidence the putative father offered as to his or her fitness would be irrelevant. The natural mother would not lose

* Experienced jurists suggest that "out of caution born of the residual uncertainties" arising from this Court's decisions, adoptions have been "handicapped and delayed" by costly and unnecessary searches for men to serve under DRL §§ 111, 111-a, either as a matter of right or of discretion, who are named as fathers but who have "established no identification or relationship with [their] alleged child[ren]" and have no legal or factual role to play in determining the children's best interests. *Matter of Marilyn H., supra,* 106 Misc. 2d at 975, 978 (citing *Caban* v. *Mohammed, supra,* 441 U.S. at 392-3; *Matter of Malpica-Orsini, supra,* 36 N.Y.2d at 572). *See also Matter of Sally Janet R., supra.*

** The court can "for good cause shown", such as active service in the Armed Forces, excuse the adoptive child or parent's personal appearance for examination. The reasons must "be recited in the order of adoption." DRL § 115(1), (8).

custody if she was unfit and the putative father would not gain it although he was fit, whether or not the adoption was granted. JS App. C5, C18-20: 102 Misc. 2d at 106-7, 114-5. Nor does a claim to paternity indicate any knowledge to contribute about the proposed adoptor. *Ibid.* Furthermore, the fact that the putative father has not previously established enough of a relationship to have qualified for notice under DRL § 111-a(2) indicates that he does not have particular or special information as to the child's best interests. JS App. A11: 54 N.Y.2d at 429.*

There is no *a priori* reason to anticipate that the participation of a putative father, merely because he and his claim are known to the judge, will increase the accuracy of the court's ultimate concern, the child's best interests. *Ibid.* Since the putative father presumptively wishes to promote his child's best interests (*see Parham* v. *J.R.*, 442 U.S. 584, 602 [1979]), and since his own substantive rights are satisfied when his child's best interests are served by a custodial or adoption ruling (*Quilloin* v. *Walcott, supra,* 434 U.S. at 255), his procedural due process rights are not infringed by being given notice only when he shows he could contribute to the accuracy of the final best interests determination.

5. Inadequacy of proposed alternatives

Appellant further suggests that DRL § 111-a violates due process because there are less restrictive alternatives to it (Brief pp. 61-2, 68). But the issue is not whether a different procedure would be desirable for policy reasons or whether a more expeditious or efficacious system could be designed. *See Sinhogar* v. *Parry,* 53 N.Y.2d 424, 436 (1981). The Legislature is not limited to one constitutional

* *See also Matter of Sally Janet R., supra,* NYLJ February 9, 1981, at p. 14, col. 1 (notice excused on unlocatable putative father who had never seen his eight year old alleged child; his lack of knowledge of the child did not "justify . . . burdening the petitioners with such a futile endeavor").

means of achieving its goals in service of a legitimate State purpose. *See Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970). Rather, the issue is whether the Constitution mandates a procedure "which [is] not now available and which would be beyond impairment or diminution by either administrative or legislative action." *Sinhogar* v. *Parry, supra,* 53 N.Y.2d at 436. As will be shown, the alternatives proposed in the courts below and here are no more certain of providing notice and far more burdensome to all concerned. The flexible notice provisions of DRL §§ 111, 111-a, ensure notice whenever appropriate. *See* pp. 22-3, 30-1 *ante,* pp. 36, 43, 45-8 *post.*

a. Identification by the mother

Appellant, for instance, would have notice given to anyone "known" to be a putative father desiring to create a familial relationship with his alleged child (Brief pp. 62-3). But his formulation of the issue begs the question, known by whom?

The mother, who usually will know the natural father's identity (JS App. 10 n. 6: 54 N.Y.2d at 428 n. 6), has no duty under DRL §§ 111, 112, 116, to disclose it. Indeed, New York provides her with testimonial immunity should she be the respondent in a paternity proceeding. FCA § 531. The furthest New York goes towards requiring such disclosure is a regulation, effective after Jessica's birth and not applicable in this case, requiring a recipient of federally reimbursed Aid to Families with Dependent Children (AFDC) assistance to cooperate in obtaining support by identifying the other parent, so long as doing so would not harm the best interests of the recipient or child.* While

* New York had no such requirement at the time of Jessica's birth on November 9, 1976. The State's present requirement that an unwed parent receiving AFDC identify the other parent is not applicable to all such parents, did not come into effect until well after

(footnote continued on next page)

there is no question here of the constitutionality of the regulation (*see Doe* v. *Norton*, 365 F. Supp. 65 [D. Ct. 1973], *vac. & rem. on other grounds sub nom. Roe* v. *Norton*, 422 U.S. 391 [1975]), extending the requirement to other situations, such as adoption proceedings, would pose constitutional problems. JS App. A15 n. 2: 54 N.Y.2d at 433 n. 2 (*Cooke*, C.J., dissenting).* As the court below noted (JS App. A10 n. 6: 54 N.Y.2d at 428 n. 6), it would also have mischievous effects in allowing a putative father to challenge a completed adoption at any time, alleging that the natural mother had committed a fraud on the court, either by not identifying a natural father at all or by naming someone other than him.** The dissenters argued that

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the period for which Lorraine allegedly received aid and, in any event, does not require the identification be made in a sworn document. 18 NYCRR § 369.2, promulgated March 9, 1977, amended August 31, 1977, January 19, 1978, June 30, 1978, May 29, 1980, July 15, 1980, March 2, 1981, April 27, 1981, August 20, 1981, December 24, 1981, January 18, 1982.

In 1975, this Court held unconstitutional SSL § 101-a(2), as added by Chapter 687, Laws of 1972, repealed by Chapter 326, Laws of 1976, requiring AFDC recipients to cooperate, not necessarily to identify the other parent. The statute violated the Supremacy Clause because it imposed eligibility requirements not authorized by the federal Social Security Act (SSA). *Lavine* v. *Shirley*, 420 U.S. 730 (1975) (*per curiam*), *affg.* 365 F. Supp. 818 (N.D.N.Y. 1972) (3-judge court). While the case was pending, the SSA eligibility requirements were amended and New York enacted SSL §349-b, again requiring AFDC recipients to cooperate. SSL § 349-b, as added by Chapter 685, Laws of 1975, amended by Chapter 326, Laws of 1976, Chapter 520, Laws of 1979.

* *Compare* Comment, "An Analysis of Unwed Father's Adoption Rights in Light of *Caban* v. *Mohammed:* A Foundation in Federal Law for a Necessary Redrafting of the Pennsylvania Adoption Act," 25 Villanova L. Rev. 317, 333 n. 123 (1979-1980), *with* Barron, "Notice to the Unwed Father and Termination of Parental Rights: Implementing *Stanley* v. *Illinois*", 9 Fam. L.Q. 527, 537-41 (1975).

** *See, e.g., In re Wildeboer*, 406 So. 2d 687 (La. Ct. App. 1981) (Louisiana statutorily requires an adoption petitioner to serve the child's parents. A petitioner natural mother's withholding of all information about the unwed father from the attorney appointed in his absence to represent his interests was such "fraud or ill practice" as to justify re-opening and annulling a six year old completed adoption).

such a requirement did not exist and might be unconstitutional. JS App. A15 n. 2: 54 N.Y.2d at 433 n. 2. They tacitly agreed that it would have mischievous effects if it applied.

b. Judge's actual knowledge

Perhaps appellant would have notice given to putative fathers of whom the hearing judge personally knows.* Such a formulation would leave a putative father's rights subject to the judge's memory of whatever information, if any, he or she happens upon. In larger jurisdictions with more than one judge hearing matters involving children,** the putative father's rights would depend on the random roulette of the case assignment system. Like the proposed requirement based on the mother's knowledge, basing one on the judge's knowledge would have mischievous effects. On the face of it, for instance, any putative father who filed a proceeding in the same court where an adoption was granted, or who wrote to the court, or who claimed to have written, would be able to allege fraud and demand access to confidential adoption records, as Jonathan

* One way the judge might gain such knowledge would be if the mother were required in every case to disclose the father's identity. For the reasons stated at pp. 32-3 *ante*, that requirement is undesirable.

Proposed *amicus curiae* Community Action for Legal Services also suggests the mother be required to state if she is or has been party to any other litigation with the child's father (Brief p. 52). *Cf.* Uniform Parentage Act §§ 10(b), 24(c) (1973), 9A Uniform Laws Annotated pp. 600-1, 615 (1979); Uniform Child Custody Jurisdiction Act §§ 9-10 (1968), 9 Uniform Laws Annotated pp. 145-7 (1979). There are again constitutional questions. *See* Barron, *op. cit.* p. 33 n. "*" *ante*, at 540. The mischievous effects on the finality of adoptions from the fraud on the court claims to which such a requirement might give rise, *see* p. 33 *ante*, may be part of the reason that New Hampshire and New York specifically stated in their versions of the Uniform Child Custody Jurisdiction Act that adoption proceedings are not covered. *See* DRL §§ 75-c(3), 75-j; N.H. RSA §§ 458-A:2(3), 458-A9.

** Ulster County, where this proceeding arose, has two Family Court judges. FCA § 131(a), (n). New York City has thirty-nine. FCA § 121.

did below (JA 52-4), and demand to depose the adoption judge, or possibly to cross-examine the judge at a hearing, as to whether he or she had actual knowledge of the putative father's claim.

c. Filing of paternity petition

The dissenting Justice in the Appellate Division suggested that the mere filing of a paternity proceeding should be enough to mandate notice under *Stanley*. The majority explicitly rejected that suggestion. *See* pp. 11-2 *ante*. The court below also rejected it, differing only as to whether actual knowledge of the petition's filing required discretionary notice. *See* pp. 13-7 *ante*.

To commence a paternity action the unwed father must compile the same information and more that he would to file with the putative father registry. He must obtain and pay a lawyer or personally go to court and prepare and file a petition. He must locate and have the mother served by a friend or pay someone to do so. These tasks can be extremely onerous for a person from another State or even just a county or two away. If the child was surrendered by the mother for adoption or if the father cannot locate her or the child, a search must be made of the Family and Surrogate's Courts in each county to ensure that an adoption is not underway. *See* p. 23 *ante*. Periodically, the search would have to be repeated.

If the petitioner knew where the adoption proceeding was pending, he could move directly to intervene there. If he did not know where the adoption proceeding was pending, the happenstance that he filed his paternity petition in the right court should not excuse him from filing with the registry. For in most areas of New York, judicial caseloads are too large to count on manual filing systems or memories to alert the court that both actions belong together. *See* p. 34 *ante*, pp. 35-6 *post*.

Perhaps in theory the courts could be required to inform the putative father registry of each case alleging paternity,

just as Judiciary Law § 254 now requires them to forward notice of actual paternity adjudications. But in calendar year 1977, there were 29,163 new paternity petitions in the Family Court alone.* In the five years since the putative father registry was established, only about 43,500 fathers have been registered.** Thus, annually more than three paternity determinations are sought for each father who voluntarily registers or who is listed following an adjudication. The cost of trebling annual additions to the registry would be great. But if the registry is to acquire paternity petitions, then it should also list all other types of legal proceedings raising the paternity issue. The cost of creating a special routine for court clerks to identify these cases for forwarding to the putative father registry would also be great. Since more than two out of three paternity proceedings are dismissed or withdrawn, *see* pp. 35-6 *ante*, adding these filings is not likely to significantly improve identification of putative fathers.

Filing with the putative father registry is far less burdensome for the father and far more likely to ensure notice to him than commencing a judicial proceeding. For persons who do file paternity proceedings, only the most minimal burden is involved in informing the registry that the suit is pending, certainly no more of a burden than filing the paternity proceeding papers in the adoptive court would be. *See* pp. 23, 26-7, 35 *ante*. Placing the burden on a truly concerned father to list his paternity action with the registry, rather than requiring the court to do so or trusting to the memories of clerks and judges or to chance, is far more efficient and less costly.

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* [*Twenty-Third Annual*] *Report of the Administrative Board of the Judicial Conference, the Judicial Conference, and the Office of Court Administration for the Calendar Year January 1, 1977 through December 31, 1977*, Legis. Doc. (1978) No. 90, Table 51.C, p. 103.

** Conversation of August 30, 1982, with Ronald Speier, Senior Attorney, Office of Counsel, Bureau of Child Welfare Services Law, New York State Department of Social Services, Albany, New York. *See* Brief of Movant *Amicus Curiae* Community Action for Legal Services, Inc., *et al.*, p. 14 n. "*".

C. Any arguable substantive due process right petitioner may have to notice is satisfied by DRL § 111-a.

In analyzing substantive due process questions, the Court has emphasized

> "that courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . ." *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963).

When the categories created by a statute in the economic field satisfy equal protection,

> "it follows *a fortiori* that the [statute] does not violate [substantive] Due Process. . . . *See Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124-125 (1978) . . . .; *Ferguson* v. *Skrupa*, [*supra*] . . . ." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n. 12 (1981).

Accordingly, the facts that DRL § 111-a is a statute in the social field and that it satisfies equal protection, *see* Point II.A *ante*, likewise establish that substantive due process is not violated.

In a number of cases, the Court has suggested that the tests for procedural and substantive due process are much the same. *See, e.g., Parham* v. *J.R.*, *supra*, 442 U.S. at 599-600 (applying *Mathews* v. *Eldridge*, *supra*, factors to procedural and substantive due process claims); *Addington* v. *Texas*, 441 U.S. 418, 425 (1979) (same).* Accordingly,

* There is authority that for a substantive claim, one must first establish the source of the right in the Constitution, while a procedural claim is more "absolute" in that it does not depend on the source or merit of the substantive assertions. *See Carey* v. *Piphus*, 435 U.S. 247, 266 (1978); *Parratt* v. *Taylor*, 451 U.S. 527, 546, 550-1 (1981) (*Powell*, J., concurring). It has been argued that this Court's decisions on the familial rights of fathers of illegitimate children have been based primarily on procedural due process and have

(footnote continued on next page)

the conclusion that DRL § 111-a satisfies procedural due process, *see* Point II.B *ante*, establishes that appellant's substantive claims are also answered.

Some commentators consider, however, that analysis is more a matter of balancing interests for substantive than for procedural due process, with emphasis on the nature of the interests under review. *See* "Developments in the Law—the Constitution and the Family", 93 Harv. L. Rev. 1156, 1194-7 (1980). Assuming that appellant had a protectible interest (*but see* p. 21 & n. "*" *ante*, Point III.B *post*), New York established reasonable administrative procedures for him to ensure that he received notice. While Jonathan's choice of a less certain, more burdensome judicial alternative was, if his claims are accepted, successful in conveying notice, one fluke is not enough to invalidate an entire statutory scheme under substantive due process. *See Parham* v. *J.R.*, *supra*, 442 U.S. at 612-3; *Mathews* v. *Eldridge*, 425 U.S. at 344. *Cf. Lalli* v. *Lalli*, *supra*, 439 U.S. at 272-3.

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not recognized fundamental substantive due process rights in unwed fathers. Comment, "Limiting the Boundaries of *Stanley* v. *Illinois*: *Caban* v. *Mohammed*", 57 Denver L.J. 671, 673-4, 676, 680-2 (1980). Arguably, the Constitution requires a natural father to give substance to his parental claims by marrying, filiating, legitimating or adopting his child. The rights of a person who proposes to follow one of the four routes remain inchoate until the process is completed, since the alleged father may lose interest, be unable to prove his claim, or, for some other reason, fail to act. Thus, in the case at bar, Jonathan would not have substantive due process rights since he had not successfully filiated Jessica. He is entitled only to procedural due process protection of his statutory rights, if any.

POINT III

The decision in *Caban* v. *Mohammed* does not provide any basis for granting appellant relief.

A. The courts below correctly held that *Caban* is not retroactive and hence is unavailable to Jonathan, who failed to appear in a timely fashion before *Caban* was decided.

1. Finality of proceeding prior to *Caban*

Jonathan's counsel learned of the adoption proceeding on March 3, 1979. Jessica's adoption order was entered March 7, 1979. *See* pp. 7-9 *ante*. Jonathan was aware of it that day through his counsel. *See* pp. 9, 28 *ante*. Implicit in the order was, as later explicitly stated by the adoption court, a determination that Jonathan had no constitutional right to appear in the adoption proceeding under then valid decisional law. JS App. C12: 102 Misc. 2d at 110, citing *Matter of Malpica-Orsini, supra*.

Jonathan could have made a timely motion to intervene in the adoption proceeding when he learned of it, either before or *after* entry of the order. Weinstein, Korn & Miller, 2 *New York Civil Practice* para. 1014.02-3 at 10-151 to -153 (1982).* Had he done so, he could have raised his constitutional claims in that proceeding. His notice of appeal filed forty-seven days later would have been untimely even as a party. CPLR § 5513, FCA § 1113. Since he was neither a party nor substituted for one, although arguably aggrieved, he did not meet the statutory definition, CPLR § 5511, of a person entitled to appeal. Nor did his bare Notice of Appeal constitute an intervention

* Lorraine's alleged fraud is thus irrelevant to the question of intervention. Assuming *arguendo* that prior fraud had prevented Jonathan from appearing, that no longer obtained as of March 3, 1979. He had an obligation to assert his claims before the Family Court in a timely manner thereafter.

motion.* Thus, by April 24, 1979, when *Caban* was announced, forty-eight days after the adoption order was entered, the reasonable time Jonathan had to act in the adoption proceeding had elapsed and the proceeding's "judicial life had expired". JS App. A6: 54 N.Y.2d at 424. There was no longer a proceeding pending to which *Caban* might be applicable when it was announced.

2. Non-retroactivity of *Caban*

The dissenters in *Caban* specifically argued that the decision was not retroactive. 441 U.S. at 401 (*Stewart*, J., dissenting); *id.* at 415-7 (*Stevens*, J., dissenting). The *Caban* majority did not object to those arguments, although it did to other portions of the dissents. *See, e.g.*, 441 U.S. at 388 n. 6. At least tacitly, therefore, the majority concurred with dissenters in denying retroactivity to the decision.**

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* Even a State agency that arguably has a statutory right to intervene must make a motion to intervene and cannot simply serve the pleadings for which intervention is sought. *See Wynn* v. *Wynn*, 51 A.D.2d 868 (4th Dept. 1976).

Of course, if the Notice of Appeal were proper, it would cast doubt on the validity of this appeal. Under the rules of the court to which that April 23, 1979, appeal was taken, Jonathan's unperfected appeal was deemed abandoned no later than April 22, 1980. 22 NYCRR § 800.12, promulgated May 20, 1976, amended August 1, 1981. His default in the appeal from the adoption order would presumably be *res judicata* on this appeal from an order denying a collateral attack upon the adoption order. Since Jonathan could have but did not perfect an appeal on the constitutional questions, he should be barred from raising them here.

** Significantly, the Court had limited even the prospective effect of its decision in *Stanley* v. *Illinois*, *supra*. While it vacated and remanded *Rothstein* v. *Lutheran Social Service*, 47 Wis. 2d 240, 178 N.W.2d 56 (1970), *vac.* 405 U.S. 51 (1972), for reconsideration in light of *Stanley*, it also instructed the court below to consider "the fact that the child has apparently lived with the adoptive family for the intervening period." *See generally* Barron, *op. cit.* p. 33 n. "*" *ante*, at 527.

Speaking for the dissenters and implicitly for the Court, Justice Stevens noted that (441 U.S. at 415-6) (footnote omitted):

> "[t]he adoption decrees that have been entered without the consent of the natural father must number in the millions. An untold number of family and financial decisions have been made in reliance on the validity of those decrees. Because the Court has crossed a new constitutional frontier with today's decision, those reliance interests unquestionably foreclose retroactive application of this ruling. *See Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 [1971]. Families that include adopted children need have no concern about the probable impact of this case on their familial security."

The *Chevron Oil* court had refused to apply a change in law, announced in one of its prior decisions, to a case filed before but still pending on the date of the prior decision's announcement. Justice Stevens clearly understood the *Caban* majority's holding to apply only to "future adoptions . . . that will arise before the statutes can be amended." 441 U.S. at 416. In his footnote "29" to the last quotation, he specifically cited *Reynolds* v. *Sims*, 377 U.S. 553, 585 (1964), for the proposition that:

> "[otherwise] valid elections may go forward pursuant to statutes that have been held unconstitutional as violating the one-person, one-vote rule, when an impending election is imminent and the election machinery is already in progress."

He thus implied that otherwise valid pending adoptions which violated the *ratio decidendi* of *Caban* could be completed.

Appellant argues that the *Caban* court and the courts below in this case have erred in worrying over giving *Caban* retroactive effect. If *Caban* were applied only to previously completed adoptions where the court had actual knowledge of a putative father raising a claim, there would,

he argues (Brief pp. 95-7), be little trauma since there would not be many fathers in a similar position able to make a successful claim. But nothing in appellant's reasoning explains what principled basis the Court would have for limiting *Caban*'s retroactive application only to cases involving facts similar to his case. Moreover, artful pleaders would find ways to state the facts of their cases so as to be like appellant's. That most would not ultimately prevail would be little comfort to the many adoptive parents who suffered the trauma of being put to defend completed adoptions or to those adoptive parents who suffered the catastrophe of actually losing their children.

Virtually every court to consider the question has followed Justice Stevens' reasoning in denying *Caban* retroactive effect in collateral attacks on completed adoptions and in applying it only to new cases and cases still in trial or appellate courts when *Caban* was announced. *See, e.g.*, JS App. A6: 54 N.Y.2d at 424; *Matter of Victory*, 78 A.D.2d 843 (1st Dept. 1980); *Matter of Mitchell*, 70 A.D.2d 367 (4th Dept. 1979). Research has found only one appellate decision holding *Caban* retroactive.* *In re Riggs*, 612 S.W.2d 461 (Tenn. Ct. App. 1980), *cert. den. sub nom. Riggs* v. *Terrazas*, —— U.S. —— (1981). The comment in *Riggs* on *Caban*'s retroactivity is *dictum* since the Tennessee Court found (612 S.W.2d at 468-9) that it was not necessary to decide if *Caban* applied because the appellant putative father was entitled to notice under *Stanley* and *Quilloin*. Furthermore, *Riggs* was factually quite different from the present case. Mr. Terrazas had no alternative to filing suit since it appears that there was no putative father registry. Moreover, he had begun taking steps to form a family relationship with his child even before the boy's birth and had been prevented by the natural mother's deliberate concealment of herself, beginning prior to the birth, and by her

* The Family Court below did find *Caban* generally retroactive but applied the *Chevron Oil* factors to excuse applying *Caban* retroactively to this case. JS App. C27-32: 101 Misc. 2d at 120-2. *See* p. 11 n. "*" *ante*.

surrender of the child by false affidavits under an assumed name. In contrast, in the present case, Jonathan could have had a familial relationship and could have ensured notice by registering. He failed for over two years to take concrete steps to show interest, steps which Lorraine could not have blocked if she wished (*see* pp. 45-6 *post*), and there is no evidence that Lorraine lied to anyone at any time in connection with Jessica or her adoption (*see* pp. 5-6 *ante*).

3. Conclusion

The Attorney General submits that the unanimous court below correctly held that *Caban* was not to be given retroactive effect. The adoption at issue had been concluded and appellant's time to act in it had expired before *Caban* was decided. Allowing this proceeding to be reopened would pave the way for other putative fathers to allege fraud in order to reopen an adoption—or to extort funds from the adoptive parents, or to seek revenge on a former lover who has left. The *Caban* court clearly intended its decision only to have prospective effect and that holding should be clearly reaffirmed.

B. Assuming *arguendo* that *Caban* had retroactive effect, it would not invalidate DRL § 111(1)(c) so as to require the putative father's consent to adoption where the putative father and child have never established a family relationship.

Since the court below unanimously held that *Caban* was not retroactive, it did not have to reach the question whether DRL § 111(1)(c) was constitutional under equal protection* under the facts and circumstances of this case in re-

* *Caban* v. *Mohammed*, *supra*, 441 U.S. at 390 n. 9, overruled the equal protection holding of *Matter of Malpica-Orsini*, *supra*, with respect to unwed fathers with substantial familial relationships with their illegitimate children. *Caban* left untouched *Orsini* v. *Blasi*'s dismissal for want of a substantial federal question of the due process challenge to DRL § 111(1)(c). Thus, even if *Caban* were retroactive, appellant's due process claims are meritless under governing case-law. *See* Point I *ante*.

quiring the consent of Lorraine, but not of Jonathan, for the adoption of Jessica. If *Caban* has no retroactive application, then *Matter of Malpica-Orsini, supra,* is the governing precedent and appellant's constitutional challenges to the adoption consent statute do not present a substantial federal question. *See* Point I *ante.* Assuming *arguendo* that *Caban* were applicable, its reasoning leaves untouched adoptions under DRL § 111(1)(c) without the natural fathers' consent in typical cases of parental abdication of rights such as this.*

Caban involved an unusual set of facts. The majority opinion clearly shows that it did not hold the statute unconstitutional in all cases. If

> "the father has never come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." 441 U.S. at 392.

Likewise, due process permits the rejection of an unwed father's claim who

> " 'has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.' " 441 U.S. at 389 n. 7, quoting *Quilloin* v. *Walcott, supra,* 434 U.S. at 256.

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* "In short, this is an exceptional case that should have no effect on the typical adoption proceeding." 441 U.S. at 416 (*Stevens,* J., dissenting). Statutes on the books when *Caban* was announced, including DRL § 111(1)(c),

> "may be enforced as usual unless 'the adoption of an older child is sought,' [441 U.S.] *ante,* at 392, *and* 'the father has established a substantial relationship with the child, *and* [is willing to admit] his paternity.' *Ante,* 393." 441 U.S. at 416 (emphasis added).

Moreover, the *Caban* court specifically held that an adoption

> "may proceed in the absence of consent when the parent whose consent otherwise would be required . . . has abandoned the child." 441 U.S. at 392 n. 13.

In contrast to the present case, the father had established a strong relationship with his children in *Stanley,* having lived with them for over eighteen years. He sought their custody in the case before the Court. Likewise in *Caban,* the father was listed as such on the two children's birth certificates. He lived with them as father for their first four and two years of life, respectively. He continued to maintain regular communication with them thereafter. He was seeking their custody in the case before the Court.

Even accepting the facts alleged by Jonathan as true, see pp. 3-7 *ante,* his actions are clearly closer to *Quilloin* than to *Stanley* or *Caban.* He never established any sort of parental relationship with Jessica. He did not pay for Lorraine's maternity expenses or ask to be listed on the birth certificate. He saw Jessica on the first three days of her life and twice during the roughly three month period in 1977 in which he admittedly knew her whereabouts. He does not mention playing with her, holding her, changing her diapers, or bringing her toys, food or clothes on any of his three hospital visits in 1976 or on his two home visits in 1977. During the seven months immediately preceding the adoption (August 1978 to March 7, 1979), during which time he admits knowing her whereabouts, he never spoke with or saw Jessica. During that period, he never visited Lorraine as Jessica's custodian. He wrote to Lorraine only twice and then through an attorney. He spoke with her, if at all, by interrupting on her calls to his mother.

Jonathan had repeated opportunities to legitimate Jessica during Lorraine's pregnancy and their engagement

but failed to do so. After Jessica's birth, he refused to marry Lorraine and legitimate Jessica. He never supported or offered to support Lorraine, even when she was receiving public assistance. He only offered to support Jessica after Lorraine married Richard. He never carried through. He took no steps to assure Jessica's security by, for instance, setting up a trust or opening a bank account for her, by making her the beneficiary of new or existing insurance, or by making her his heir in his will, although he could have done so even over Lorraine's objection. He did not register with the putative father registry. He waited until Jessica was over two years old and part of a new family before seeking visitation and filing a filiation proceeding.* He does not now seek custody.

At most, Jonathan's claims show that he played a parental role with Jessica's sister Renee, a role which he apparently has abandoned. It also appears that Helen has been acting as Jessica's grandmother, but based on Lorraine's relation with her (Helen) as a mother figure, not on Jonathan's alleged paternity.

Jonathan did too little too late. When Lorraine sought to form a legitimate family with him and her daughters, he refused. When she left and made a new life for herself, he did not take any of the many steps that he could without Lorraine's cooperation—indeed, over her objection—to establish a claim to Jessica.

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* In *Matter of Michael Patrick C.*, 88 A.D.2d 932 (2d Dept. 1981), the alleged hostility of the natural mother and her family to the putative father did not excuse a five month failure to make "affirmative efforts to see the child [or] to contact any agency or attorney for assistance in this regard." In this case, after Jonathan allegedly again located Lorraine in August 1978, he waited four months before asking for visitation. There, the putative father "decided to take affirmative steps—he contacted an attorney—only when he knew absolutely that the adoption was going forward." *Ibid.* Here, Jonathan waited two years and took legal action only when he knew an adoption was contemplated. "This course of conduct is akin to abandonment and, had it continued for six months, might well be so adjudged (*see* [DRL § 111(2)(a)])." *Ibid.*

The quality of the relationship he seeks to establish is show by his present abandonment of Renee* and his lukewarm attempts to see Jessica. He does not even allege he tried to bring Jessica a gift when he visited her home in 1977—and it is difficult to believe he could visit with one child all four times he came by and failed to see the other child two of the four times, if he had asked seriously—or to send a gift when he had his attorney write shortly before Christmas 1978. His failure to commence a paternity proceeding promptly, or to intervene in a timely manner on the adoption, or even to perfect his appeal there, all belie an intent to act as Jessica's father. *Cf. Matter of John J.S.* v. *Theresa L.*, 99 Misc. 2d 578, 582 (Bronx Fam. 1979).

On balance and taking the facts Jonathan alleges as true, it appears he abdicated his parental rights with respect to Jessica within the criteria of DRL § 111(2)(a), (6). Although able to do so, he has failed for more than two years** to visit or communicate† with Jessica. His insubstantial and infrequent communications with Lorraine

* Interestingly, Lorraine alleges that Jonathan at one time did seek to maintain a relationship with Renee (JA 146-8). But if her story is accepted, most of his fraud claims are controverted.

** Goldstein, Freud and Solnit in *Beyond the Best Interests of the Child* (New Ed. 1979) continue to emphasize that younger children have a more urgent sense of time than adults or older youths, making a separation of more than two months for a child under five years old the emotional and intellectual equivalent of permanent loss of that person as a psychological parent. *Id.*, pp. 40-2. They recommend holding separations of such length or longer to be abandonment without regard to cause or fault because as far as the child is concerned, abandonment rests not on the adult's intentions but on the impact on the child. *Id.*, pp. 77-8. Even if the parent is prevented from maintaining contact with his or her child, some penalty must be assessed other than changing custody, for "what is important is that the child not become the award for damages." *Id.*, p. 79 n. "*".

† For the purposes of adoption, provision of support is considered communication in New York. DRL § 111(6)(d). Thus, even if Lorraine had denied Jonathan access to Jessica and refused to speak with him, he could have communicated within the meaning of the law by putting money aside to assure Jessica's future financial security. *See* p. 46 *ante*.

about Jessica cannot all be blamed on Lorraine.* Nor has he supplied any substantial allegations or real evidence of acts manifesting his intent to visit, communicate or pay support until the eve of this proceeding.**

Jonathan cannot avail himself of *Caban* because even if his factual claims are accepted, he failed until much too late to try to establish a parental relationship. As applied to Jonathan and Jessica, DRL § 111(1)(c) *is* constitutional under due process and equal protection.

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* Real evidence of fraud presented during the adoption proceeding could preclude a finding of abandonment. Thus, in *Matter of Sean Y.* v. *John Y.*, 62 A.D.2d 426 (3d Dept. 1978), there was no dispute as to paternity, the father had demonstrated continuing interest in the child by opening a bank account, and the mother had actively concealed the child's whereabouts. But here there is a question as to paternity, the father has taken minimal steps much too late to show interest, and his visits and communications were infrequent and insubstantial during the lengthy periods in which even he concedes that he knew Lorraine and Jessica's location.

** In evaluating whether an unwed father's relationship with his alleged child is sufficient to warrant notice, New York has emphasized objective "evidence of acts", discounting "subjective intent" unless supported by such evidence. DRL § 111(6)(c). *Cf.* SSL § 384-b(5)(b), (7)(b)-(c). The focus is on acts that will demonstrate that a *de facto* family unit including the biological father has been formed, rather than on questions of intent and inference that would allow

> "an absentee biological father [to] frustrat[e] the attempts at adoption undertaken by the natural mother in the perceived best interests of the child where she is the only parent available to it."

Matter of "Female" D., 83 A.D.2d 933, 935 (2d Dept. 1981) (sustaining the constitutionality of DRL § 111[1][e], as added by Chapter 575, Laws of 1980).

This emphasis was carried over when the Legislature codified *Caban*. Objective acts are required to support a claim of intent to build a familial relationship with an infant who is over six months old when placed. Intent is totally ignored in demanding evidence of acts to form a familial relationship with respect to younger children placed for adoption. DRL § 111(1)(d)-(e), as added by Chapter 575, Laws of 1980.

Conclusion

The order of the court below should be affirmed and the constitutionality of Domestic Relations Law §§ 111, 111-a, upheld under the facts and circumstances of this case.

Dated: New York, New York
September 16, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Intervenor-Appellee Pro Se

PETER H. SCHIFF
Acting Attorney-in-Chief,
Appeals and Opinions

ROBERT J. SCHACK
Assistant Attorney General
Of Counsel

APPENDIX A

Statutory Framework

At the time of Jessica's adoption in March, 1979, New York Domestic Relations Law (DRL) § 111(1)(d), renumbered as DRL § 111(1)(f) by Chapter 575 of the Laws of 1980, provided that an unwed father with "lawful custody" of his child was entitled to veto power over the child's adoption. App. B at pp. 33a-34a *post*: Attorney General's Appendix, N.Y. Court of Appeals (A.G. App. 18).* Pursuant to DRL § 111(3)-(4), he had to be given notice of any adoption proceeding unless he was disqualified by unfitness or surrender, DRL § 111(2), or the child was over eighteen years of age, DRL § 111(3). Other unwed fathers were not entitled to withhold or grant consent to adoption.**

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* An unwed father could become his child's lawful custodian by appointment as guardian of the person (see N.Y. Family Court Act (FCA) § 661, N.Y. Surrogate's Court Act §§ 1701, 1703, 1705; *Matter of Morgan*, 70 Misc. 2d 1063 [Erie Surr. 1972]), by order of filiation and custody (FCA §§ 511, 522, 549, 551), by *habeas corpus* or declaratory judgment and order of custody (FCA § 651; *Matter of Salvatore S.* v. *Anthony S.*, 58 A.D.2d 867, 868 [2d Dept. 1977]), or by testamentary appointment (DRL § 81; *see* Heaton & Warren, 2B *Procedure and Law of Surrogates' Courts of the State of New York* § 216 ¶ 1(h) at 38-137 [Markuson, Ed.; 1978]).

** Following the decision in *Caban* v. *Mohammed*, 441 U.S. 380 (1979), Chapter 575 of the Laws of 1980 renumbered paragraph (d) of DRL § 111(1) as paragraph (f) and added new paragraphs (d) and (e), providing notice and a right to consent to certain unwed fathers. For an infant less than six months old when placed for adoption, the unwed father qualifies for notice and veto power only if he held himself out to be the father while openly living "with the child or the child's mother for a continuous period of six months immediately preceding the [adoptive] placement" and he paid "a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child." DRL § 111(1)(e).

With respect to a child placed for adoption more than six months after birth, the unwed father qualifies only if he "maintained substantial and continuous or repeated contact with the child as manifested by" either openly holding himself out as the father while openly living

(footnote continued on next page)

Appendix A

An unwed father was otherwise entitled to notice of an adoption proceeding to enable him (DRL § 111-a[3]):

> "to present evidence to the court relevant to the best interests of the child",

if he was (DRL § 111-a[2]):

> "(a) [a] person adjudicated by a court in this state to be the father of the child;
>
> "(b) [a] person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry . . .;
>
> "(c) [a] person who has timely filed an unrevoked notice of intent to claim paternity . . . [with the putative father registry];
>
> "(d) [a] person who is recorded on the child's birth certificate as the child's father;
>
> "(e) [a] person who is openly living with the child or the child's mother at the time the [adoption] proceeding is initiated and who is holding himself out to be the child's father;
>
> "(f) [a] person who has been identified as the child's father by the mother in written, sworn statement; or

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"with the child for a period of six months within the one year period immediately preceding the [adoptive] placement" or by "payment . . . of a fair and reasonable sum, according to the father's means," for child support and "either . . . visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or . . . regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the [custodial] person or authorized agency . . . ." DRL § 111(1)(d). Of course, even a father who qualifies under DRL § 111(1)(d) or (e) may be disqualified by unfitness or surrender under DRL § 111(2).

"(g) [a] person who was married to the child's mother within six months subsequent to the birth of the child."*

Finally, an unwed father who did not qualify for notice under DRL §§ 111(1)(d), (4), 111-a(2)(a)-(g), might still be given notice of an adoption proceeding "if the judge or surrogate so orders" pursuant to DRL § 111(3). JS App. A9: 54 N.Y.2d at 427 (*Jones*, J.); JS App. A15: 54 N.Y.2d at 433 (*Cooke*, C.J., dissenting). *See also* DRL § 115(9).

The notice and consent provisions of DRL §§ 111, 111-a, apply both to agency adoptions, those where an authorized agency had custody of the child, and to private-placement adoptions, those where, as in the case at bar, a parent had custody. The petition in a private-placement adoption must contain any consents required by DRL § 111, including a statement showing why a consent is not required. DRL §§ 112(3)(3), 115(1), (5)-(6). There is no requirement that the father be named.

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* Chapter 575 of the Laws of 1980 amended the seventh category, paragraph (g) of DRL § 111-a, to require the marriage to have occurred "prior to the execution of a surrender instrument or the initiation of a proceeding [to terminate parental rights]." Chapter 575 also added an eighth category, paragraph (h), to DRL § 111-a(2). In 1979, Chapter 139 had enacted N.Y. Estates, Powers and Trusts Law § 4-1.2, creating a non-judicial mechanism by which unwed fathers can execute formal paternity acknowledgments that entitle their illegitimate children to inherit from them. Chapter 139 also amended N.Y. Social Services Law (SSL) § 372-c(1)(d) to require those acknowledgments be listed with the putative father registry. By oversight, Chapter 139 did not provide for such putative fathers to receive notice of adoption proceedings although all other fathers listed with the registry do. Compare SSL § 372-c(1)(a)-(c) with DRL § 111-a(2)(a)-(c). Chapter 575 added paragraph (h) to DRL § 111-a(2) and amended SSL § 384-c(2) to ensure such fathers receive the same notice as other putative fathers of adoption proceedings, foster care entry reviews, voluntary surrenders of guardianship and custody, and proceedings to terminate parental rights.

Appendix A

A waiting period of six months after the petition is filed, during which the child resides with the adoptive parents, is generally required. DRL §§ 112(6), 116(1). The period can be shortened by the court "for good cause shown" and is not required at all if the adoptive parent is married to the child's natural parent and the child has resided with them for more than six months. DRL § 116(1).

The adoption court receiving the petition reviews it for facial validity and issues an order of investigation. DRL § 116(2). The investigation includes examination of "the truth and accuracy of the allegations of the petition" (DRL § 116[3]), including "the marital and family status, and history, of the adoptive parents and adoptive child" (DRL § 116[3][a]), thus insuring that the court is informed of any person entitled to notice. The report also examines their mental and physical health, any mistreatment of children, their "familial, social, religious, emotional and financial circumstances", and other factors (DRL § 116[3][b]-[f]), thus providing the court with relevant facts on the prospective parents' character and fitness. If the court is satisfied that the statute has been fully complied with and "that the best interests of the child will be promoted by granting an order of adoption," it shall do so. DRL § 116(4). The order may authorize the child's name to be changed. DRL § 114 [first unnumbered subdivision]. The adoption records are to be sealed and kept secret except on court order for good cause. DRL § 114 [second unnumbered subdivision]. The court granting the adoption may at any time (DRL § 114 [third unnumbered subdivision]):

> "open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause."

Appendix A

N.Y. Domestic Relations Law § 111. Whose consent required [as of March 7, 1979].

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental illness or mental retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law.

3. Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c) of subdivision one of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in paragraph (d) of subdivision one of this section shall not be required if in his opinion the best

interests of the adoptive child will be promoted by the adoption and such consents cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child.

N.Y. Domestic Relations Law § 111-a. Notice in certain proceedings to fathers of children born out-of-wedlock [as of March 7, 1979].

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b.

In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall

set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother within six months subsequent to the birth of the child.

3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

4. Notice under this section shall be given at least twenty days prior to the proceeding by delivery of a copy of the petition and notice to the person. Upon showing to the court by affidavit or otherwise, on or before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the person's last known address with reasonable effort, notice may be given, without prior court order therefor, at least twenty days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity pursuant to section three hundred seventy-two-c of the social services law, to the address last entered therein. Notice by publication shall not be required to be given to a person entitled to notice pursuant to the provisions of this section.

5. A person may waive his right to notice under this section by written instrument subscribed by him and acknowledged or proved in the manner required for the execution of a surrender instrument pursuant to section three hundred eighty-four of the social services law.

6. The notice given to persons pursuant to this section shall inform them of the time, date, place and purpose of

the proceeding and shall also apprise such persons that their failure to appear shall constitute a denial of their interest in the child which denial may result, without further notice, in the adoption or other disposition of the custody of the child.

7. No order of adoption and no order of the court pursuant to section one hundred fifteen-b shall be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section but failed to appear, or who waived notice pursuant to subdivision five. Nor shall any order of adoption be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section in any previous proceeding pursuant to section one hundred fifteen-b in which the court determined that the best interests of the child would be served by adoption of the child by the adoptive parents.

Chapter 575, Laws of 1980, Amendments to N.Y. Domestic Relations Law §§ 111, 111-a.

N.Y. DOMESTIC RELATIONS LAW § 111(1)-(2) [as amended by Chapter 575, Laws of 1980].

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of the father, whether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock,

who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision.

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (ii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

(f) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) Who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental illness or mental retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law; or

(f) who has executed an instrument, which shall be irrevocable, denying the paternity of the child or consenting to the other parent's surrender of the child or consent to the child's adoption, such instrument having been executed after conception and acknowledged or proved in the manner required to permit the recording of a deed.

N.Y. Domestic Relations Law § 111-a(2)-(3) [as amended by Chapter 575, Law of 1980].

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement;

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law; and

(h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law.

3. The provisions of this section shall not apply to persons entitled to notice pursuant to section one hundred

eleven. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

N.Y. Domestic Relations Law § 116. Orders of investigation and order of adoption.

1. When the adoptive child is less than eighteen years of age, no order of adoption shall be made until six months after the court shall have received the petition to adopt, except where the spouse of the adoptive parent is the natural parent of the child and the child has resided with the natural parent and adoptive parent for more than six months, such waiting period shall not be required. The judge or surrogate may shorten such waiting period for good cause shown, and, in such case the order of adoption shall recite the reason for such action. The six months residence period specified in section one hundred twelve of title two of this article and the six months waiting period provided in this subdivision may run concurrently in whole or in part.

2. Stage one of private-placement adoption. At the time of receiving the petition, agreement and consents, the judge or surrogate, upon finding that the applicable provisions of section one hundred fifteen have been complied with and that it appears that the adoption may be in the best interests of the child, shall issue an order of investigation hereunder. The order of investigation shall require

that the report of such investigation be made in accordance with subdivision three of this section, and may require or authorize further investigations from time to time until the granting of the order of adoption. Should such investigation give apparent cause, the judge or surrogate shall require the petitioners to show cause why the child should not be removed from the home, upon due notice to all persons whose consent is required for the adoption, and in any case where the consent of the natural mother would not otherwise be required, the judge or surrogate may in his discretion require that she be given due notice. On the return date the judge or surrogate shall take proof of the facts shown by any such investigation. If the court is satisfied that the welfare of the child requires that it be removed from the home, the judge or surrogate shall by order remove the child from the home of the petitioners and return the child to a natural parent or place the child with an appropriate authorized agency or, in the case of a surrogate, transfer the child to the family court. The judge or surrogate may also require that notice be given to an appropriate authorized agency.

3. The judge or surrogate shall cause to be made an investigation by a disinterested person who in the opinion of the judge or surrogate is qualified by training and experience, or by an authorized agency specifically designated by him to examine into the allegations set forth in the petition. The investigator shall make a written report of his investigation into the truth and accuracy of the allegations of the petition, and, where applicable, into the statements contained in the affidavit required by section one

hundred fifteen of this title, and he shall ascertain as fully as possible, and incorporate in his report the various factors which may bear upon the determination of the application for adoption including, but not limited to, the following information:

(a) the marital and family status, and history, of the adoptive parents and adoptive child;

(b) the physical and mental health of the adoptive parents and adoptive child;

(c) the property owned by and the income of the adoptive parents;

(d) the compensation paid or agreed upon with respect to the placement of the child for adoption;

(e) whether either adoptive parent has ever been respondent in any proceeding concerning allegedly neglected, abandoned or delinquent children;

(f) any other facts relating to the familial, social, religious, emotional and financial circumstances of the adoptive parents which may be relevant to a determination of adoption.

The written report of investigation shall be submitted to the judge or surrogate within thirty days after the same is directed to be made, unless for good cause shown the judge or surrogate shall grant a reasonable extension of such period. The report shall be filed with the judge or surrogate, in any event, before the final order of adoption is granted.

4. Stage two of private-placement adoption. If the judge or surrogate has found that there has been compliance with all the requirements hereof and is satisfied that the best interests of the child will be promoted by granting an order of adoption, the provisions of section one hundred fourteen of title two of this article shall apply.

5. As used in this section, "disinterested person" includes the probation service of the family court.

N.Y. Social Services Law § 372-c. Putative father registry [Paragraph (d), subdivision (1), added by Chapter 139, Laws of 1979].

1. The department shall establish a putative father registry which shall record the names and addresses of: (a) any person adjudicated by a court of this state to be the father of a child born out-of-wedlock; (b) any person who has filed with the registry before or after the birth of a child out-of-wedlock, a notice of intent to claim paternity of the child; (c) any person adjudicated by a court of another state or territory of the United States to be the father of an out-of-wedlock child, where a certified copy of the court order has been filed with the registry by such person or any other person; (d) any person who has filed with the registry an instrument acknowledging paternity pursuant to section 4-1.2 of the estates, powers and trusts law.

2. A person filing a notice of intent to claim paternity of a child or an acknowledgement of paternity shall include

therein his current address and shall notify the registry of any change of address pursuant to procedures prescribed by regulations of the department.

3. A person who has filed a notice of intent to claim paternity may at any time revoke a notice of intent to claim paternity previously filed therewith and, upon receipt of such notification by the registry, the revoked notice of intent to claim paternity shall be deemed a nullity nunc pro tunc.

4. An unrevoked notice of intent to claim paternity of a child may be introduced in evidence by any party, other than the person who filed such notice, in any proceeding in which such fact may be relevant.

5. The department shall, upon request, provide the names and addresses of persons listed with the registry to any court or authorized agency, and such information shall not be divulged to any other person, except upon order of a court for good cause shown.

APPENDIX B

Extracts from the "Attorney General's Appendix" in the Court of Appeals of the State of New York (Legislative History of Chap. 665, L. 1976; Chap. 862, L. 1977; Chap. 575, L. 1980: Domestic Relations Law §§ 111, 111-a)

N.Y. Temporary State Commission on Child Welfare, *Children of the State II* (1976).

(A.G. App. 1)

[LETTERHEAD OF]

THE TEMPORARY STATE COMMISSION
ON CHILD WELFARE

Empire State Plaza
Agency Bldg. #4
10th Floor
Albany, N.Y. 12223
518-474-7031

October, 1976

TO THE GOVERNOR AND THE LEGISLATURE
OF THE STATE OF NEW YORK:

Pursuant to Chapter 1064 of the Laws of 1974, as amended by Chapter 29 of the Laws of 1975, I have the honor to transmit the Second Report of the State Commission on Child Welfare.

This has been a year of high accomplishment for the Commission. It was a year which saw the enactment of a major reconstitution of the Laws of the State of New York

governing termination of parental rights. This legislation was the culmination of over a year of extensive research undertaken by the Commission in a research and demonstration project funded by the State Department of Social Services, pursuant to a Federal Title IV-B grant and entitled "Barriers to the Freeing of Children for Adoption".

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(A.G. App. 2)

Respectfully submitted,

/s/
Senator Joseph R. Pisani
CHAIRMAN

Appendix B

(A.G. App. 4)

THE RIGHTS OF FATHERS OF CHILDREN BORN OUT-OF-WEDLOCK

Serious questions have been raised, as to the rights of the fathers of children born out-of-wedlock to have a voice in the various proceedings affecting the status and future of their offspring, by the U.S. Supreme Court decision in *Stanley* v. *Illinois,* 905 U.S. 645, and, more recently the New York Court of Appeals decision in *Orsini* v. *Blasi,* 36 N.Y. 2d 568, appeal dismissed by the U.S. Supreme Court "for want of a substantial federal question", 96 S. Ct. 765 (1976).

These questions have created substantial delays in initiating proceedings to free children for adoption in that questions have been raised on such matters as the right to notice, to be heard, to participate as a party, and the obligation of agencies to make diligent searches for putative fathers whose rights, constitutional or otherwise, may be in jeopardy. The nebulous state of the law and the resulting confusion on the part of agencies, attorneys and judges made the study of this problem a matter of priority for the Commission.

In the aftermath of the *Stanley* decision, states and public and voluntary agencies have either overreacted or underreacted because of the absence of clear statutory guidelines. Overreaction has often been noted in agency or administrative practices requiring extensive searches for unidentified or unknown putative fathers which have resulted in failures to free children for adoption and an inability to plan for the future of many children. Needless, often futile and protracted, searches have also placed heavy staff and financial burdens on both public and voluntary

agencies which can ill afford them. Overreaction has also been characterized,

(A.G. App. 5)

in some states, by the equation of the rights of fathers of in-wedlock and out-of-wedlock children (for example, by requiring the latter's consent to the child's adoption)—a legal proposition not supported by the *Stanley* decision and clearly nullified by the Supreme Court's dismissal of the appeal of the New York Court of Appeals decision in *Orsini*.

On the other hand, underreaction to *Stanley*, by failing to provide concerned, adjudicated or other readily identifiable fathers of out-of-wedlock children with notice and an opportunity to be heard in proceedings involving the child's custody, guardianship or adoption, may result ultimately in the vacating of court orders in such proceedings.

To assist in its efforts, with funding from the Edna McConnell Clark Foundation, the Commission was able to study approaches taken by the states under *Stanley* and to develop a solution to meet New York's problems and requirements. On March 31, 1976, the Commission convened a meeting in Albany of interested parties, including representatives of the State Departments of Health and Social Services, the New York City Department of Social Services, the Office of Court Administration, the Law Revision Commission, the Legislature, and the Governor's Program Office. An agenda of issues had been prepared by the Commission staff, and these issues were discussed and led to fundamental decisions by the group. A bill was thereupon prepared by Commission staff (S.10484, A.12944) and introduced by Senators Pisani, Dunne and Halperin and Assemblymen Blumenthal and Gottfried, which reflected the decisions reached at the meeting.

Appendix B

This measure will dispel uncertainties by providing clear constitutional statutory guidelines for notice to fathers of

(A.G. App. 6)

out-of-wedlock children. It will establish a desired finality in adoption proceedings, and will provide an expeditious method for child placement agencies of identifying those fathers who are entitled to notice through the creation of a registry of such fathers within the State Department of Social Services. Conversely, the bill will afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to be notified and to have an opportunity to be heard. It will also obviate an existing disparity in Appellate Division decisions by permitting such fathers to be petitioners in paternity proceedings.

The measure is intended to codify the minimum protections for the putative father which *Stanley* would require. In so doing, it reflects policy decisions to (a) codify constitutional requirements; (b) clearly establish, as early as possible in a child's life, the rights, interests and obligations of all parties; (c) facilitate prompt planning for the future of the child and permanence of his status; and (d) through the foregoing, promote the best interests of children.

The bill passed the Legislature and was signed into Law by the Governor as Chapter 665 of the Laws of 1976.

Upon signing the bill, the Governor recommended that provisions governing the time for a putative father to respond to legal process be extended beyond the ten days afforded in the bill. The Commission intends to recommend corrective legislation early at the 1977 Legislative Session.

Appendix B

(A.G. App. 14)

[LETTERHEAD OF]

STATE OF NEW YORK
EXECUTIVE CHAMBER
Albany 12224

MEMORANDUM filed with Senate Bill Number 10484, entitled:

"AN ACT to amend the social services law, the domestic relations law, the judiciary law and the family court act, in relation to certain rights of fathers of out-of-wedlock children"

APPROVED

In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Supreme Court held that the father of an out-of-wedlock child had a substantial and cognizable interest in the custody of his child. The court required that such a father be provided with notice and an opportunity to be heard prior to a decision terminating his parental rights. In *Matter of Malpica-Orsini* (36 N.Y. 2d 568, appeal dismissed 96 S. Ct. 765) the New York State Court of Appeals held that the consent of a father of an out-of-wedlock child is not required prior to placing the child for adoption unless such father has custody of the child at the time of the petition for adoption.

In the aftermath of these decisions, there has been substantial confusion as to the obligation of courts and adoption agencies towards putative fathers. While some agencies have construed the court decisions to require extensive searches for unidentified and unknown putative fathers resulting in protracted delays in making children eligible for adoption, others have failed to provide notice and an op-

portunity to be heard to adjudicated or other readily identifiable fathers of out-of-wedlock children in proceedings affecting the child's custody, guardianship or adoption.

This bill, developed by the Temporary State Commission on Child Welfare, attempts to set forth guidelines for notifying fathers of out-of-wedlock children of proceedings affecting their parental interests. The bill specifies categories of fathers of out-of-wedlock children to whom the notice requirements enacted apply. It requires the Department of Social Services to establish a putative father registry to record the names and addresses of persons adjudicated by courts of this State to be the father of an out-of-wedlock child; persons who filed with the registry before or after the birth of an out-of-wedlock child a notice of intent to claim paternity of the child; and persons adjudicated by the court of another state to be the father of an out-of-wedlock child where a certified copy of the court order has been filed with the registry by such person or by any other person.

The bill requires notice of proceedings affecting the future of the child to be given to putative fathers to enable such persons to present evidence to the court relevant to the best interests of the child.

(A.G. App. 15)

The notice required to be given must be served by registered or certified mail to the person's last known address at least ten days prior to the proceeding. Notice by publication is not required, nor does the bill require any attempts at personal service. Failure to appear constitutes denial of an interest in the child which may result, without further notice, in the termination of parental rights.

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While, on balance, the bill largely accomplishes its aims of achieving finality as early as possible in a child's life in the establishment of the rights, interests and obligations of all parties, its failure to provide more adequate provisions for notifying putative fathers of proceedings affecting the child is troubling. The notice provision, for example, is less demanding than that required in an ordinary civil suit. The time to respond is a relatively brief ten days.

The sponsors of this bill recognize that its notice provisions could be improved and have agreed to make amendments extending the time for the putative father to respond. Since the bill does not take effect until the first day of January, I am confident that remedial legislation can be enacted early in the next legislative session to address these problems.

Approval of the bill is recommended by the Temporary State Commission on Child Welfare, the Department of Social Services, the Mayor of the City of New York, the Family Court Judges Association, the Legal Aid Society and the Federation of Protestant Welfare Agencies.

The bill is approved.

/s/ Hugh L. Carey

Appendix B

(A.G. App. 16)

[LETTERHEAD OF]

THE TEMPORARY STATE COMMISSION
ON CHILD WELFARE

Room 203
State Office Building
270 Broadway
New York, N.Y. 10007
212-488-4843

July 7, 1976

Hon. Judah Gribetz
Counsel to the Governor
Executive Chamber
The Capitol
Albany, New York 12224

RE: S.10484 (Ten Day Bill)

Dear Mr. Gribetz:

My bill, S.10484, will shortly be before the Governor for Executive action. In response to your request for comments and recommendations concerning this bill, which is multi-sponsored by Senators Dunne and Halperin and which was introduced in the Assembly by Assemblymen Blumenthal and Gottfried, I am enclosing herewith a copy of a memorandum in support thereof.

The bill, prepared by the staff of the Temporary State Commission on Child Welfare of which I am Chairman reflects many months of study by the Commission pursuant to a grant therefor received by the Commission from the Edna McConnell Clark Foundation; it also addresses itself

to a substantial barrier to the freeing of children for adoption as identified by the Commission in its study on that subject performed for the State Department of Social Services under a Title IV-B Research and Demonstration Project Grant.

As the enclosed memorandum indicates, the bill is responsive to the U.S. Supreme Court decision in *Stanley* v. *Illinois,* 405 U.S. 645. In the aftermath of that decision, states and public and voluntary agencies have either overreacted or underreacted thereto, in the absence of clear statutory guidelines. Overreaction has often been noted in agency or administrative practices requiring extensive searches for unidentified or unknown putative fathers which have resulted in tragic failures to free children for adoption and inability to plan for the future of many children. Needless, often futile and protracted searches have also placed heavy staff and financial burdens on both public and voluntary agencies which can ill-afford such burdens. Overreaction has also been charcterized, in some states, by the *equation* of the rights of fathers of in-wedlock and out-of-wedlock

(A.G. App. 17)

children (for example, by requiring the latter's consent to the child's adoption)—a legal proposition not supported by the *Stanley* decision and clearly nullified by the Supreme Court's dismissal (96 S. Ct. 765), for want of a substantial federal question, of the appeal of the New York Court of Appeals decision in *In re Malpica-Orsini,* 36 N.Y. 2d 568.

On the other hand underreaction to *Stanley,* by failing to provide concerned, adjudicated or other readily identifiable fathers of out-of-wedlock children notice and oppor-

tunity to be heard in proceedings involving the child's custody, guardianship or adoption, may result ultimately in the vacating of court orders in such proceedings.

This bill is intended to codify the *minimum* protections for the putative father which *Stanley* would require. In so doing it reflects policy decisions to a) codify constitutional requirements; b) achieve *finality, as early as possible* in a child's life, in the establishment of the rights, interests and obligations of all parties, and, conversely, to eliminate extant uncertainty, as soon as possible in relation to these rights, interests and duties; c) to facilitate planning for the future of the child and permanence of his status; and d) through the foregoing, to promote the best interests of children. These general policies and also many of the specific procedures, protections and other provisions of the bill were developed at a meeting I convened in Albany on March 31. Present at that meeting, in addition to Commission staff, were representatives of the State Department of Social Services and Health, the Office of Court Administration, the Law Revision Commission, staff of Assemblymen Blumenthal and Gottfried, the Chief Counsel of the New York City Human Resources Administration and the Governor's Program Office.

The measure establishes a putative father registry in the State Department of Social Services which would record the names and addresses of certain putative fathers. Operation of the registry would be subject to seventy-five percent federal reimbursement under Title IV-D of the U.S. Social Security Act. State and local government costs of operation which according to the State Department of Social Services are expected to be minimal would be offset

by savings generated by (1) reduction in casework time currently required to exercise "diligent searches" to locate and notify out-of-wedlock fathers of child custody proceedings; (2) reduced costs of notice (by registered or certified mail) under the bill rather than the current more costly method of notice by publication; and ultimately (3) reduction in public costs of foster care as appropriate children are more expeditiously freed and placed for adoption.

I am aware that the New York State Catholic Conference and the Association of the Bar of the City of New York have expressed opposition to various provisions of the bill, as has the New York State Council of Voluntary Child Care Agencies which otherwise supports the legislation. In rebuttal, I would offer the following observations:

(A.G. App. 18)

(1) The Catholic Welfare Conference states (in correspondence from Catholic Charities of the Archdiocese of New York) that the bill fails to give primary emphasis to the best interests of the child. On the contrary, the bill states that the sole purpose of the notice requirement is to afford the father an opportunity to present evidence bearing on the child's best interests. Furthermore, it would not be in the child's best interests to delay settlement of the rights of the father and other parties, or to risk subsequent reversal or vacating of judicial decrees affecting his custody, guardianship or adoption.

(2) The bill has been criticized for its "failure" to assure confidentiality to the mother and to assure that the father will not be involved in future planning for the child. This criticism manifests misunderstanding of the *Stanley*

decision which precludes such assurances and requires involvement of the father to the extent of his constitutional right to notice and an opportunity to be heard.

(3) Catholic Charities claims that notice to the father of the §358-a (Social Services Law) proceeding would impede agency planning with mothers. On the contrary, it would settle the father's rights at a very early stage and thereby facilitate planning for the child.

(4) It has been argued that the bill is unconstitutional in failing to provide for notice to the father in each and every proceeding affecting the child where notice and opportunity to be heard had *previously* been given. *Stanley,* in the opinion of myself and others, requires only that the father have "his day in court" which term does not require an appearance in each and every proceeding affecting a child's custody. The statutory notice provided by the bill fully informs the father of the effect of his failure to appear. I would also emphasize that relitigation of the issues in each and ever proceeding involving the child (§358-a, approval of surrender, termination of parental rights, adoption) would create an unbearable restraint on the ability to plan for the child and would seriously burden the entire agency adoption system in this State.

(5) The bill has been criticized for failing to require consents to adoption from fathers of out-of-wedlock children, who have custody of the child. This requirement is *present* law, as contained in Domestic Relations Law, §111, subdivision four. This section requires consent to adop-

tion of "*any person* or authorized agency having lawful custody of the adoptive child"; this includes the father of the out-of-wedlock child who has legal custody. I should emphasize that, at the meeting described above, it was decided that considerations relating to *extension* of the right to consent or to withhold consent to adoptions were viewed as a completely separate issue not raised by *Stanley* and held to be unnecessary as a constitutional right in *Malpica-Orsini*. Accordingly, such extension is not effected by this bill, and it is a separable public policy issue which can be considered in the future.

(A.G. App. 19)

(6) The Association of the Bar of the City of New York has urged expansion of the notice requirements to include fathers who have "acknowledged" paternity and "filed" such acknowledgements (in some unspecified place), persons "known" by the mother to be the father, persons holding themselves out to be fathers, and men "voluntarily supporting the child". This recommendation ignores the need for a measure of finality in completed adoptions and fails to recognize that fathers included in these "categories" are not readily identifiable. Such expansion of the notice requirements would therefore create a constant danger of having failed to give notice resulting thereafter in the reopening of consummated adoptions. The recommendation of the Bar Association is also impractical in that it would require attorneys for adoptive parents to search 62 county clerk's offices for "filed acknowledgments" and would require affidavits by the mother negating the existence of such men ("known; "holding themselves out",

"supporting") and would raise questions as to whether such affidavits would be binding on an unserved father. In any event, if these fathers are truly concerned, the bill affords them the remedy of filing a notice of intent to claim paternity.

(7) The Association of the Bar also criticizes the provisions of the bill which require a father, who filed with the putative father registry a notice of intent to claim paternity, to keep a current address on file with the registry. It should be noted that such father has elected not to avail himself of his right (established by the bill) to initiate a paternity proceeding, but, rather, has chosen the less involved procedure of filing a "notice of intent" which will also protect his right to notice of subsequent proceedings affecting the child. It is not unreasonable to expect this man to manifest a modicum of continuing interest and concern by maintaining a current address on file. Such a requirement is patently constitutional and the Association of the Bar does not appear to contend otherwise.

(8) It has been urged that the provision for ten days' notice is inadequate and that twenty or thirty days should be provided. I would observe that a ten days' notice provision is not without precedent, that it affords ample opportunity for a concerned party to enter an appearance, and that where adequate opportunity has not been afforded to obtain counsel, the court, under current law, may and usually does grant an adjournment for that purpose. In any event, if circumstances demonstrate that ten days is,

in fact, inadequate and works hardship upon fathers receiving notice, I will be willing to introduce ameliatory legislation at an early point in the next legislative session.

Finally, I would call to your attention the fact that the bill refers in several places to Section 384-b of the Social Services Law. This section, which contains new, unified provisions for proceedings to terminate parental rights, would be added to the law by S.8850-A which is now or will soon be before the Governor for Executive action. S.8850-A contains the statutory recommendations of the Temporary State Commission on Child Welfare resulting from its Title IV-B Study referred to above.

(A.G. App. 20)

In conclusion, this is a significant bill which creates fair, constitutional procedures without unduly burdening the State's child care and agency adoption systems. I would respectfully urge that the Governor give Executive approval to the bill.

Sincerely yours,

/s/
Joseph R. Pisani
State Senator

JRP:dme

Appendix B

(A.G. App. 32)

[LETTERHEAD OF]

CITIZENS' COMMITTEE FOR CHILDREN
OF NEW YORK, INC.

2 Park Avenue New York, N.Y. 10016 (212) 725-7940

July 6, 1976

The Honorable Judah Gribetz
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: *S. 10484 (Pisani, Dunne, Halperin)*

Dear Mr. Gribetz:

In response to your request for our analysis, comments and recommendations on the above-captioned bill, we must first note that it should not be enacted unless S. 8850-A, A. 11310-A is signed into law, for S. 10484 is designed to supplement the notice provisions for new proceedings created by the other bill.

After extensive review, Citizens' Committee for Children finds itself unable to recommend the adoption of S. 10484 in its present form. We would gladly support it if it were amended along the lines suggested below and repassed at the July 28th session.

S. 10484 seeks to clarify the rights of fathers out-of-wedlock children. The work of the Temporary State Commission on Child Welfare, of which this bill's sponsors are chairman and members, clearly showed that the absence of

guidelines on the rights of "putative fathers" is a major problem in foster care and freeing children for adoption. Because the need for such guidance is so great, we had at first hoped to be able to endorse this bill, but a continued process of consideration and consultation has illuminated so many problems in it that we do not find ourselves able to recommend it as it stands.

Who Receives Notice

The bill presents (proposed Social Services Law sect. 384-c(2)) a list of the categories of men entitled to notice of proceedings involving their out-of-wedlock children, including an adjudicated father, a man living with the mother, a man listed as the father on the child's birth certificate or so identified by the mother in written, sworn statement, and a man who married the mother subsequent to the child's birth. This list attempts to concentrate on objective, easily ascertainable factors, and omits some concerned fathers who ought to receive notice

(A.G. App. 33)

(for instance, fathers who are not "*openly* living with the child or the child's mother," but have a "family type" of relationship) and includes others who ought not to receive notice (the argument for requiring notice to a person who married the child's mother after its birth is not strong, but becomes tenuous at best if the mother remarries even once).

The question of who should and shouldn't receive notice could be addressed gradually, but the bill's requirement that *every* man from one of its categories of possible fathers receive notice demands immediate attention. There may be some reason for having several alternative putative

fathers given notice if no-one has been adjudicated as the father, but once there *is* an adjudicated father, only he should receive notice, *not*—as this bill requires—all the others as well.

Limits on Existing Rights

Even more important than the list of who is to receive notice, for that could be amended in later years, is the limitation placed on the putative father's rights. The bill purportedly overrides any inconsistent provisions of the law in providing a procedure whose "*sole* purpose" is to give the father notice of a proceeding at which he may only "present evidence to the Court relevant to the best interest of the child" (proposed SSL sect. 384-c(3)). All other rights at these proceedings which such fathers may now have under the law, such as an arguable right to refuse consent to an adoption, would be eliminated.

Thus, if this bill becomes law, a man who had successfully sued to be recognized as the father of a child and who had supported the child although, for one reason or another, he had had to place the child in foster care, would only be entitled to *notice* of the proceeding and could no longer insist that his *consent* was necessary for the child's adoption by another person. We suggest, however, that while there might be cases in which such a father's objections to an adoption could be overridden, in the ordinary case his consent *should* be necessary. We do not believe that permitting him only to submit evidence adequately safeguards his rights. In this connection, we must point out that the

caselaw in this area is not conclusive, and we believe that a court might well find consent constitutionally required in this situation.

This section should be amended either by deleting the word "sole" so that the notice would also be effective for other purposes or by adding a sentence to specify that the father may assert in the proceeding any other rights he may have, as well as present evidence on the child's best interests.

• • •

(A.G. App. 36)

Yours sincerely,

/s/

Robert J. Schack
Staff Counsel

RJS/mb

Appellant's Reply Brief

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No. 81-1756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

In the matter of the Adoption of Jessica Martz, a Minor under the age of fourteen years, by

JONATHAN LEHR,

Appellant,

–v.–

LORRAINE ROBERTSON,
RICHARD N. ROBERTSON, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK (Case No. 565)

APPELLANT'S REPLY BRIEF

DAVID J. FREEMAN, ESQ
175 Main Street
White Plains, New York 10601
(914) 949-3311
Attorney for Appellant

APPEAL DOCKETED: March 22, 1982
JURISDICTION POSTPONED: MAY 17, 1982.

(13215)

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LAW REVIEW ARTICLES, TEXT BOOKS AND OTHER AUTHORITIES

"An Analysis of Unwed Father's Adoption Rights in Light of Caban v. Mohammed", 25 Villanova 317 (1980) Law Review 12

POINT I - THE ARGUMENT MADE BY APPELLEES AND THEIR AMICI THAT APPELLANT DOES NOT HAVE A LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS FRIVOLOUS AND IS BASED UPON A MISSTATEMENT OF THIS COURT'S PRIOR DECISIONS.

Faced with the onerous task of having to convince this Court that Lehr was not entitled to the most rudimentary of due process safeguards, to wit, notice and the opportunity to be heard*, the Appellees and their Amici, National Committee for Adoptions,(NCA) have tried to attack Appellant's source of his due process rights, to wit, his liberty interest under the Due Process Clause of the Fourteenth Amendment.

In reaching this conclusion, the Attorney General cites, as his main point, the contention that Lehr theoretically could have obtained notice either by signing the Putative Father Registry or in some other

* See Armstrong v. Manzo, 380 U.S. 545,550 (1965)

way complying with the statutory requirements of Section 111a.* Thus, according to the Attorney General, Lehr's liberty interest depended upon two factors: his biological relationship, and, compliance with State requirements. This argument, however, erroneously presupposes that State law is the only source of a liberty interest.

While it is true that Lehr could have filed in the Putative Father Registry, or in some other way complied with Section 111a,** Lehr does not here look to the State or its statutes as a source of his liberty interest. The source of Lehr's liberty interest is the Federal Constitution. In Mills v. Rogers, ___ U.S. ___, 73 L.Ed. 2d 16, 22-24 (1982), this Court

*A.G. brief p. 26,27. See also Robertson brief p. 22

** Lehr had no knowledge of the Registry, and even if he had such knowledge, he had no reason to file. See J.A. p. 36 n. 8.

explicitly recognized this dual source of a person's liberty interests, and further, indicated that both state and constitutionally founded liberty interests are entitled to the protection of the Federal Due Process Clause*.

Appellees and Amici NCA, however, attempt to redefine this Federally created liberty interest. They cite this Court's prior decisions in Stanley v. Illinois, 405 U.S. 645 (1971); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979), and its dismissal for want of a federal question in Matter of Malpica-Orsini, 36 N.Y. 2d, 568, app. dsm'd, sub nom Orsini v. Blasi, 423 U.S. 1042 (1976), as standing for the proposition that a putative father does not

*Mills v. Rogers, ___ U.S. ___, 73 L. Ed. 2d, 16, 23 (1982).

have a liberty interest unless he has "sired and raised" the child* or has established a substantial relationship with his child**. Appellees and their Amici NCA go to great lengths to describe the extent of the relationship or lack thereof***

* See Amici brief of the National Committee for Adoption, Inc. p.15 (NCA brief) citing Stanley v. Ill., supra.

** See Attorney General brief, p. 25-26 (A.G. brief) citing Quilloin v. Walcott, supra, at 255, for the view that Lehr has "...no interest deserving of procedural or substantive due process protection." See also Appellees Robertson brief, (Robertson brief) pgs. 25-27.

*** As stated by the A.G. brief p.3 fn*, and Amici NCA fn.3, the facts as recited by Lehr must be deemed true and uncontroverted since there was no hearing below. Therefore, this reply brief will not delve into the relationship issue, except for one major point. The Attorney General indicates (A.G. brief pgs. 18, 46 n*) that Lehr engaged an attorney to seek visitation and an order of paternity only after he knew that an adoption was contemplated. This is factually untrue. Lehr first found out about the adoption on March 3, 1979, through his attorney when the latter was served with change of venue papers from the Ulster County Family Court (J.A. p.40; Lehr brief p.13). Lehr had come to his attorney in December of 1978, (Lehr brief p.10) and had instituted his paternity, visitation and support proceedings on January 30, 1979, (J.A. 73) well prior to learning of the adoption. This shows clearly that Lehr's desire to establish a parental relationship with Jessica was not influenced in any way by the adoption proceedings. The same good faith, however, cannot be attributed to Lorraine and Richard Robertson

between Lehr and Jessica to show that Lehr had no liberty interests and therefore no due process rights, procedural and/or substantive. While it is admitted that the existence of a relationship or the attempts to form one goes to the question of the extent of Lehr's procedural due process and substantive due process rights*, the liberty interest at stake is created by the biological relationship between parent and child, whether or not legitimized by marriage**. The

(*** continued) who, within a few days after receiving a letter from Lehr's attorney requesting visitation with Jessica, secretly commenced adoption proceedings on December 21, 1978. Lorraine had been married to Richard for more than a year without commencing such adoption proceedings.

* Stanley v. Illinois, supra, (right to notice and a fitness hearing); Quilloin v. Walcott, supra, (right to hearing on individualized interests in child); Caban v. Mohammed, supra (right to consent to adoption).

** See Santosky v. Kramer, ___ U.S. ___ 102 S.Ct. 1388 (1982) See Amicus Curiae, The Community Action for Legal Services, Inc., "CALS" brief, pgs. 34-35 citing Smith v. O.F.F.E.R., 431 U.S. 816, 845 (1977). See also Lehr brief, pgs. 44-50.

Court's decisions, while not directly dealing with this issue, have clearly implied this result.

In Stanley v. Illinois, supra, at 657 p.9, the Court implicitly recognized that even unknown putative fathers who obviously would have minimal or no contacts with the child other than the biological relationship, would be entitled to due process in the form of notice, albeit constructive notice.*

This reasoning was followed in Quilloin, supra, where the Court recognized that Peter Quilloin had due process rights of notice and a hearing on his individualized interest in the child despite the

* The Court refers to Peter Stanley having "sired and raised" his child, in defining his private interests. (Stanley, supra, 405 U.S. at 651). This private interest has been subsequently defined by this Court as one of the factors to be balanced in determining what process is due a putative father. See Matthews v. Eldridge, 424 U.S.,319, 335 (1976); Santosky v. Kramer, 102 S.Ct.1388, 1396, 1387 (1982). In Peter Stanley's case, he was entitled to notice and a hearing as to his fitness.

fact that he had not "raised" the child nor had he exercised or sought custody. His lack of a relationship, together with his failure to seek custody, merely deprived him of the substantive right of consent. It did not deny him notice and the opportunity to be heard.

Perhaps, however, this Court's decision in Little v. Streater, 452 U.S.1 (1981), more than any other decision, recognizes Lehr's liberty interest as being founded solely upon his biological relationship with Jessica. In Little, supra, the State of Connecticut had instituted paternity and support proceedings against a putative father who had no relationship and no contacts with his illegitimate child.* This Court found that the putative father therein had a liberty in-

* The putative father was identified by the mother in her application for public assistance for the child. At the time of the proceedings, the putative father was incarcerated. Little v. Streater, 452 U.S. at 3.

terest and defined that liberty interest as being the imposition of a parent-child relationship upon a putative father. The Court found that the imposition of such a relationship constituted a taking of the putative father's liberty interest and therefore required due process*. In reaching this conclusion, the Court relied upon its holding in Stanley v. Illinois, 405 U.S. 645. Thus, the Court in Little, supra, supports the proposition that just as the termination of a parent-child relationship constitutes a taking of a liberty interest (as in Stanley, supra), so too does the creation of a parent-child relationship. As the Court stated:

> "This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage and accorded them constitu-

*The issue before the Court was whether or not a state statute is violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment when it requires that persons requesting a blood group test must bear the cost therefor even when the person is indigent and cannot afford such a test.

> tional protection. See Stanley v. Illinois, 405 U.S. 645, 651-2, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1972). Just as the termination of such bonds demands procedural fairness, see Lassiter v. Department of Social Services, post, p.18, 68 L.Ed.2d 640, 101 S.Ct. 2153 (1981), so too does their imposition."
> Little v. Streater, 452, U.S. at 13.

A putative father's entitlement to due process protection is therefore not based upon any substantial relationship between father and child. There is no requirement that the putative father "sire and raise" the child or that he be adjudicated, to be afforded these rights. It is the biological relationship between the putative father and his child which creates the liberty interest. Any state action which constitutes a taking of this liberty interest, whether by way of creating a parent-child relationship (Little v. Streater, supra), or terminating this

relationship (Stanley v. Illinois, supra; Lassiter v. Dept. of Social Services, 452 U.S. 18 (1981)) requires due process protections.

POINT II - THE NOTICE PROVISIONS OF THE NEW YORK STATE DOMESTIC RELATIONS LAW, SECTION 111.3 AND SECTION 111a, DO NOT MEET MINIMUM DUE PROCESS STANDARDS WHERE THERE IS A TERMINATION OF PARENTAL RIGHTS.

The Appellees have argued that Section 111a and Section 111.3 meet the minimum due process requirements because said statutory provisions are readily available and easy to use*, establish a Putative Father Registry which is open to all putative fathers**, and provide a further discretionary "safety valve" for the courts to give notice***.

It is submitted, however, that the statutory framework of the Domestic Relations Law, Section 111 and Section 111a, is based upon speed and efficiency and administrative convenience for the State. The State has absolutely no obligation or requirement to insure notice to a

* A.G. brief, pg. 26-27
** id.
*** Section 111.3 of Domestic Relations Law.

putative father. All avenues to notice involve affirmative action by the putative father or his reliance upon the unwed mother*. Nothing could be easier and cheaper than setting up a central registry and requiring the putative father to file to get notice**. But to make such a system workable, the State should have actively pursued a program de-

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* It can be seen how easily an alienated unwed mother can dupe the putative father into believing that he was within a Section 111a category. In the instant case, Lehr stated that Lorraine had told him that she had given his name to the Welfare Department and further led him to believe that his name was on the birth certificate (J.A.26). If true, either of these would have entitled Lehr to notice, Section 111a 2 (d) and (f), assuming a sworn statement by Lorraine.

** Even such a central registry would be ineffective if the mother went to another state to have the child adopted. This would encourage forum shopping by prospective adoptive parents. The only solution would be for a costly and intricate cross indexing system among the states.

signed to advertise its availability*, especially when the ineffectiveness of such Registry was so obvious**. The Attorney General has argued that it is presumed that many more adjudicated putative fathers know about the Putative Father Registry but do not register because it would impose support obligations upon them***.

*See CALS brief pg. 14-15 where Registry is not even listed in telephone directory or available from Directory Assistance Operator.

** Since the inception of the Putative Father Registry in 1977, there have been only 617 filings by putative fathers of a Notice of Intent to claim paternity (256 of these were received during 1982). There were 46,113 putative fathers entered on the Putative Fathers' Registry as a result of Court filings. See letter from N.Y. State Dept. of Social Services, dated Sept. 21, 1982 annexed to this brief as App.A. To show how ineffective the Registry has been, in 1979 there were 53,748 out-of-wedlock births, and in 1980, 56,797 out-of-wedlock births. See Vital Statistics of New York State, 1979, 1980, published by the N.Y.S. Dept. of Health, Table 25 Out of Wedlock Births.

*** A.G. brief P 27 fn.*. The reasoning of the Attorney General is spurious. If a putative father is adjudicated, then it can be assumed that the Court which had adjudicated him as the father also would have imposed support (continued)

This is procedure by presumption which this Court found to be constitutionally infirm in Stanley v. Illinois,* supra. Appellees' Amici would also like the presumption that Section 111a is accessible to those putative fathers who have established a relationship, or those who intend to do so.** This is also procedure by presumption.*** It appears that the Appellees indeed acknowledge that these are deficiencies

(continued ***) obligations upon him. In addition why would an adjudicated father file in the Putative Registry as he is already entitled to notice of an adoption proceeding under Section 111a.2?

* Stanley v. Illinois, supra, 405 U.S. at 657.

** NCA brief, p. 18.

*** See Lehr brief, pg. 59-64 for proposition that in many cases, concerned and caring fathers would not fit into any of the Section 111a "pigeonholes." Further, isn't it more probable that a putative father wishing to establish a relationship would do what Lehr did, to wit, ask a court to grant him visitation rights, adjudicate him the father, and impose support obligations?

with Section 111a and Section 111.3 but they are willing to sacrifice notice to some interested unwed fathers in order to obtain a prompt and efficacious procedure*. As Appellee Robertson states: "It must not be forgotten that the State's interest is not to overly protect the parents of illegitimate children**.

However, it is submitted that where there is a termination of parental rights as here, there is a need not only for minimum due process protections, but "heightened procedural safeguards***". Although the Attorney General acknowledges that Section 111a and Section 111.3****

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* A.G. brief p. 25.
** Robertson brief p. 23.
*** Santosky v. Kramer, 102 U.S. at 1398.
**** The Attorney General's argument that Section 111.3 is a "safety valve" is shown by this case to be frivolous. Said section was not used to give Lehr notice in this case, where he had given actual notice of his parental interest as opposed to the constructive notice of the Putative Father Registry.

would leave a few interested putative fathers cut off from their children forever, this Court has rejected such a caviler attitude. This Court has stated: "Given the weight of the private interest at stake, the social cost of even occasional error is sizeable*."

The State cannot meet due process requirements by creating just "... some mechanism for notice" as Appellees would contend.** There must be a balancing of the private interests, risk of erroneous termination using the State procedures, and the administrative and fiscal effects on the State if new procedures were adopted***.

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* Santosky v. Kramer, 102 S.Ct. at 1400. See also Stanley v. Illinois, 405 U.S. 652: "The State registers no gain towards its declared goals when it separates children from the custody of fit parents."

** Robertson brief p. 23

*** Matthews v. Eldridge, 424 U.S. 319 (1976); see generally Lehr's brief pgs. 51 et al., and CALS brief pgs. 32 et al.

POINT III - THERE ARE ALTERNATE NOTICE PROVISIONS WHICH WOULD GIVE PUTATIVE FATHERS SUCH AS LEHR NOTICE WITHOUT BEING ADMINISTRATIVELY OR FISCALLY BURDENSOME AND WHICH WOULD FURTHER THE STATE OBJECTIVES.

The Attorney General's argument that there are no viable alternatives to giving putative fathers notice other than the existing provisions of Section 111.3 and Section 111a is once again based upon the premise that the most convenient system is all that is required, and that neither the State nor the natural mother should be "burdened" with having to assist in identifying a putative father.

The Attorney General contends that the mother should not be required to identify the putative father* He cites the mother's privacy rights** and

* A.G. brief p. 32.

** There appears to be little doubt that a state can regulate such privacy rights provided there is a legitimate state interest. See Doe v. Norton, 365 F.Supp. 65(1973).

the spectre of a later attack on the adoption proceedings by putative fathers who were not identified by the mother at the time of such proceedings.

Clearly there are no privacy rights where, as here, there was never any question as to paternity.* In addition, this is not the case where the mother's or child's name would have to be published to give constructive notice to the father.** Until a final order of adoption is entered, the mother should clearly be required to identify the natural father or anyone claiming to be the father,*** or disclose

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*During Lorraine's pregnancy, she was engaged to Lehr and all were aware that Lehr was the father. (J.A. 25, 26,60,61) Also, Lorraine had lived openly with Jessica for close to a year.

** If notice by publication were required, the fathers name would be used.

*** See "Comment. An Analysis of Unwed Father's Adoption Rights in Light of Caban v. Mohammed," 25 Villanova L.Rev. 317 (1980)at 321,322 for support of this view. Further, since adoption records are sealed, the identification would not go beyond the doors of the courthouse. N.Y.Domestic Relations Law, Section 114.

if she is a party to a proceeding in which the question of paternity is an issue.* In the instant case, Lorraine submitted to the Court an affidavit in which she swore that there are no persons entitled to notice pursuant to Section 111a.** Requiring her to identify the father is a logical extension of this affidavit.

The Attorney General's fears that putative fathers not identified by the mother would later attack the adoption because they were not identified is spurious. They would also attack it on the ground of not receiving notice. It appears elementary that the State, the child, and the mother have a substantial interest in finality of adoption proceedings which mandates an early identification of the father so that he may be made a party to the adoption proceedings and be bound,

* CALS brief, pgs. 51, 52.
** See Lorraine Affidavit (J.A. 135).

and therefore precluded from later collaterally attacking the adoption. This concept has most recently been set forth in the New York case of Matter of Christopher L., 113 Misc. 2d, 904, (Surr. Ct. Bronx Co., 1982), where the Surrogate's Court indicated that in non-agency adoptions, where the mother's interest was in concluding the adoption application, the preferred course would be to require that the putative father be disclosed "... and given his day in court prior to his parental rights being extinguished." Citing Santosky v. Kramer, supra.*

* See also, Matter of Burnadette LC, 115 Misc.2d 78 (1982, Surrogate Gelfand, Family Ct, Bronx), "the finality of any adoption proceeding is enhanced by affording parties adversely affected by a determination the opportunity to have their day in court if they wish to be heard". Amici NCA argues (NCA brief, p. 24 fn.8) that it would be desirable for hearings to be held after the adoption to determine whether the putative father was actually entitled to notice, citing Armstrong v. Manzo, 380 U.S. 545 (1965). This would clearly leave adoption proceedings in a voidable status and thus contrary to the expressed State objective of finality.

The Attorney General also argues that the State should not be "burdened" with having Family Courts notify the Putative Father Registry of the filing of paternity petitions*. The institution of a paternity proceeding by a putative father shows the desire to maintain a relationship with the child** and should therefore serve as a strong incentive for the State to insure that those putative fathers receive notice, for it is these concerned putative fathers who have the

* A.G. brief, pg.35.

** The A.G. argued (A.G. brief, pg.27-28) that Lehr's attorney should have advised him to file in the Putative Father Registry instead of commencing a paternity proceeding. Lehr, however, wanted to do more than just give constructive notice of an intent, at some future time, to claim paternity. He wanted to support and visit Jessica immediately, and since there was no reason to believe that there was an adoption proceeding pending (Cooke, dissent J.S. App. A16), Lehr took the course designed to meet his needs. It was not until June of 1979, 3 months after the adoption, that Lehr's attorney became aware of Appellees' toying with the idea of adoption when Lorraine's mother so indicated in her affidavit (J.A. 62). c.f. A.G. brief, p. 28; see also CALS brief, p.62.

most to lose by an adoption, and who can provide the most valuable information as to the child's best interests. The fact that there may be imposed an additional administrative or fiscal burden upon the State does not mean that the procedure is not viable or necessary in light of the State objectives*.

The Attorney General also does not feel a judge should be expected to act upon his knowledge of a putative father's identity, whereabouts, and concern for his child**. This reasoning is illogi-

* Stanley v. Illinois, supra, at p. 657 fn.9 "We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal." See also Little v. Streater, 452 U.S. 1 (1981), (where the State was required to bear the expense in blood grouping tests), and Boddie v. Conn. 401 U.S. 371(1971), (violation of due process to require indigents to pay court costs in order to obtain a divorce).

** A.G. brief, pgs. 34-35.

cal. If a judge is to carry out his mandate and act in the best interests of the child, why shouldn't the judge be required to give notice to someone like Lehr who is likely to have valuable information?*

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* See Matter of Jessica XX, 54 N.Y. 2d. 417 (1981). In his dissent C.J. Cooke found nothing ""startling" about requiring a judge to give notice in this situation. In fact, before Section 111a was adopted, New York case law would have required notice in this situation (See Matter of Donna P., 80 Misc. 2d 129 (1974), where the court required notice to any person believed to be the father).

POINT IV - CABAN V. MOHAMMED, 441 U.S. 380 (1979)

THE DECISION OF THE COURT IN CABAN V. MOHAMMED MAY BE APPLIED RETROACTIVELY DESPITE THE FACT THAT THIS APPEAL IS BASED UPON A COLLATERAL ATTACK RATHER THAN UPON DIRECT APPEAL.

The Appellees argue that Caban, supra, cannot be applied to this appeal because the case was not in direct judicial review at the time that Caban, supra, was decided*. It is submitted that this Court has ignored the distinction between cases on direct appeal and those arising on collateral attack in determining the retroactivity issue. As this Court stated in Williams v. U.S., 401 U.S. 646 (1971) in discussing Linkletter v. Walker, 381 U.S. 618 (1965) and the issue of retroactivity:

> "Nor have we accepted as a dividing line the suggested distinction between cases on direct review and those arising on collateral attack. Rather we have proceeded to weigh the merits and demerits in

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* A.G. brief, pgs. 39-40.

each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 401 U.S. at 651-52.*

*Lehr argued in the courts below that the case was still in judicial review at the time Caban, supra, was decided and therefore the state courts would have been obligated to apply the principals of Caban.

THE RESULT IN CABAN V. MOHAMMED, SUPRA, WAS CLEARLY FORESHADOWED BY PRIOR SUPREME COURT DECISIONS.

Appellees' Amici NCA claims that the application of the first Chevron factor to this case mandates a result of non-retroactivity*. (Chevron Oil Co., v. Huson, 404 U.S. 97, (1971). Amici point to the fact that Caban, supra, was not clearly foreshadowed by prior precedents. It is submitted that at the time of Caban, supra, the New York statutory scheme (S111a.3) which limited the putative fathers' role in adoption proceedings to submitting evidence as to the child's best interest, was clearly unconstitutional under Stanley v. Illinois, supra. All putative fathers were presumed unfit to have custody of their children, no matter what their relationship was with the child. Caban, supra,

*NCA brief, pgs. 34-37

merely reiterated the same principal set forth in Stanley, supra, i.e., that putative fathers could not be treated differently procedurally or substantively, solely because of their sex*, and the presumption that, in general, they were unfit. This presumption was and remains the basic premise of Section 111a and Section 111.**

Nor can the Appellees claim reliance upon this Court's dismissal of Malpica-Orsini, supra, as standing for the proposition that Caban was a sharp break in the web of law.*** In Malpica-Orsini, supra, the New York Court of Appeals' decision was on the consent issue alone****, and im-

*Caban v. Mohammed, 441 U.S. at 388.

** See Malpica v. Orsini, 36 N.Y. 2d 568,575 (1975). "The inferior classification of the father of a child born out of wedlock bears a significant relationship to the recognized purpose which Section 111 commendably serves."

*** A.G., brief pg. 42 fn.*.

**** See CALS brief, pg. 23-24.

plicitly recognized a putative father's procedural and substantive due process rights to notice and a hearing*. Thus, the dismissal by this Court left intact the procedural and substantive rights which had been afforded the putative father**.

Further, only minimal reliance could be given to this Court's dismissal of Orsini v. Blasi, supra, even on the consent issue***.

---

* As the New York Court of Appeals pointed out in Malpica at 377: "Due Process was not lacking here. Although this was an adoption proceeding, Appellant Orsini having been given notice by Court direction, the right to object and a full hearing with representation by an attorney, was not deprived of Due Process."

** This also answers the Attorney General's argument that this appeal has not raised a Federal question (A.G. brief pg.21). By claiming that he was denied due process in the form of notice and a hearing, Lehr has raised Federal issues apart from his claim that he was entitled to the substantive due process right of consent.

***Caban v. Mohammed, 441 U.S. at 390 fn.9: "At the same time, our decision not to review fully the questions presented in Orsini v. Blasi is not entitled to the same deference given a ruling after briefing, argument, and a written opinion." cases cited.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals was violative of Appellant's rights of Due Process and Equal Protection under the Fourteenth Amendment of the Constitution of the United States and should be reversed.

Respectfully submitted,

DAVID J. FREEMAN
Attorney for Appellant
175 Main Street
White Plains, N.Y. 10601
914 949-3311

On the Brief
Evelyn Petrone, Esq.

Appendix A

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
40 NORTH PEARL STREET, ALBANY, NEW YORK 12243

Arthur Y. Webb
Acting Commissioner

September 21, 1982

David J. Freeman
Attorney at Law
175 Main Street
White Plains, New York 10601

I am responding to your letter of September 14, 1982, regarding filings in the Putative Father Registry which is maintained in this office. The answers to your questions are as follows:

(1) As of today, a total of 617 fathers have filed a Notice of Intent to Claim Paternity. 256 of these registrations were received during 1982.

(2) The number of individuals entered on the Putative Father Registry as the result of court filings was 46,113 as of August, 1982.

Please contact me if you believe that I can be of further assistance.

Sincerely,

Peter C. Winkler
Associate Social Services
Planning Specialist

PCW/ltw

Amicus Brief

1

MOTION FILED
SEP 15 1982

No. 81-1756

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

JONATHAN LEHR,
Appellant

v.

LORRAINE ROBERTSON *et al.*
Appellees

On Appeal From The Court Of Appeals
Of The State Of New York

MOTION AND

BRIEF FOR THE NATIONAL COMMITTEE FOR ADOPTION, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEES

ELINOR HADLEY STILLMAN
4424 Albermarle St., N.W.
Washington, D.C. 20016
(202) 363-9145
(202) 463-7559

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 81-1756

JONATHAN LEHR,

Appellant

v.

LORRAINE ROBERTSON, ET AL.,

Appellees

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE

The National Committee For Adoption hereby moves, pursuant to Rule 36.3 of the Rules of this Court, for leave to file the within brief as amicus curiae in this case. In support of this motion, the Committee shows:

1. Counsel for all parties have been asked to give permission for the filing of this brief in support of appellees. Jay Samoff, counsel for appellees Lorraine and Richard Robertson consented on their behalf, and Robert J. Schack, Assistant Attorney General for the State of New York has

stated that the State neither consents nor refuses consent to the filing of any amicus brief in this case but leaves the matter to the Court. David Freeman, counsel for appellant, sent a letter dated August 6, 1982, refusing consent to this filing.

2. The National Committee For Adoption ("the Committee"), a national, voluntary organization concerned with issues affecting adoption, is composed of both individual members and private, not-for-profit licensed adoption agencies providing services in 39 states and the District of Columbia. The individual members include adoptive parents, persons who were adopted, biological parents of children adopted by others, and interested professionals. The Committee sponsors conferences on adoption issues and follows developments in state laws affecting adoption and is especially concerned about legal developments--legislative or judicial--that affect the timing of adoptive placements of young children or the finality of such placements, once made.

3. Resolution of the issues in this case could seriously affect the law in these areas of concern, and the Committee believes that its views--reflecting the perspective of, inter

alia, adoptive parents and agencies providing adoptive services--would be of assistance to the Court.

Respectfully submitted,

Elinor Hadley Stillman

Elinor Hadley Stillman,
Counsel for the National
Committee For Adoption

September 1982

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO. 81-1756

JONATHAN LEHR,

Appellant

v.

LORRAINE ROBERTSON, ET AL.,

Appellees

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR THE NATIONAL COMMITTEE FOR ADOPTION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The National Committee For Adoption ("the Committee"), a national, voluntary organization concerned with issues affecting adoption, is composed of both individual members and private, not-for-profit licensed adoption agencies, providing services in 39 states and the District of Columbia. The individual members include adoptive

parents, persons who were adopted, biological parents of children adopted by others, and interested professionals. The Committee sponsors conferences on adoption issues and follows developments in state laws affecting adoption, and it is especially concerned about legal developments--legislative or judicial--that affect the timing of adoptive placements of young children or the finality of such placements, once made.

The Committee has a particular interest in the issues in this case because, depending on how broadly they are resolved, a decision might seriously affect the Committee's areas of concern. Because the Committee's membership includes adoptive parents neither of whom is biologically related to the adopted child, the Committee is speaking for persons whose interests could be affected by a decision in this case, but who are not specifically represented by any of the parties. The Committee believes that its views would be of assistance to the Court.

STATEMENT OF THE CASE

In her adolescent years, Lorraine Martz (now appellee Lorraine Robertson) lived a troubled life. At the age of 16, she left the home in which she had grown up and found refuge in the home of Mrs. Helen Lehr, who was appointed as her guardian for approximately a year (J.A. 23, 57-58).[1] Within about a year, Mrs. Lehr dissolved the guardianship because of her objections to Lorraine's absences and her relationship with a boyfriend (J.A. 58).

At the age of 17 or 18, Lorraine became pregnant. She accompanied her boyfriend to North Carolina, where he abandoned her and she gave birth to a daughter, Renee (J.A. 59). She returned with Renee to Mrs. Lehr's home in New York State, and this time became seriously involved with Mrs. Lehr's son, Jonathan, the

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[1] The Statement is based on the allegations in affidavits submitted by appellant Jonathan Lehr in support of his petition seeking vacation of the order of adoption concerned in this case. Whether those allegations are in fact true is irrelevant; they must be assumed to be true for purposes of judging the propriety of the Ulster County Family Court's denial of appellant's motion. In addition, some facts alleged in the adoption petition that appellant does not appear to dispute--such as the date on which Lorraine married Richard N. Robertson, Jr.--are included.

appellant in this case. From the fall of 1974, when Lorraine was 19 and Jonathan was 22, until November 1976, Lorraine, Jonathan, and Lorraine's daughter, Renee, lived together in Westchester County. There were apparently occasional interruptions in this living arrangement, which appellant describes as "almost" continuous (J.A. 22-23, 59-60). During this time, Lorraine became pregnant. She told others that Jonathan was the child's father, and there was some talk of a marriage between Lorraine and Jonathan (J.A. 25, 60-61). A brief engagement was dissolved because Jonathan was devoting his financial resources to his education (J.A. 61).

Lorraine gave birth to a second daughter, Jessica Martz, on November 9, 1976 (J.A. 23, 61). Jonathan does not aver either that Lorraine told him that she had listed his name as father on the birth certificate or that he inquired whether she had. He asserts, rather, that she gave no indication that she had not done so (J.A. 27-28). Jonathan visited Lorraine and the child in the hospital, but Lorraine and Jonathan did not resume living together when she left the hospital (J.A. 27-28). Lorraine went to live with other friends after the birth (J.A. 28). Jonathan was unaware of her whereabouts for approximately six months (J.A. 28).

During her pregnancy and after Jessica's birth, Lorraine supported herself and Renee on welfare payments from the State of New York's Department of Social Services (J.A. 26 n.6). Before and after Jessica's birth, she advised Jonathan that the Department had threatened to terminate her benefits if she did not reveal Jessica's father and that the Department might bring proceedings against him to obtain support payments (J.A. 26-27). Jonathan states that he did not seek to dissuade her from identifying him as the child's father and he states that he was "ready to assume [this] responsibility" (J.A. 27). However, the Department never filed support proceedings against him; and when he located Lorraine in Milton, New York, about six months after Jessica's birth, his response to Lorraine's request that he marry her was that he "could not make such a commitment at that time, either morally or financially, as he was still attending school and was unsure that marriage would be in the best interests of all concerned" (J.A. 28-29).

That discussion took place on one of four consecutive weekends, during which Jonathan visited Renee at the home where Lorraine was

staying, and on two of those occasions he saw Jessica. On the other two occasions, he was not permitted to visit Jessica (J.A. 29-30). He did not press for continued visitations at that time, thinking that Lorraine might perhaps at a later time change her mind (J.A. 30).

Sometime during the summer of 1977, Lorraine moved away without leaving a forwarding address (J.A. 30). She married Richard N. Robertson, Jr., on August 28, 1977, and they lived together thereafter with her children (J.A. 31, 81). Jonathan discovered their address a year later, in August 1978 (J.A. 31). (At some point during that year he had consulted a detective agency (J.A. 30)). Prior to August 1978, Lorraine had spoken by telephone with Mrs. Helen Lehr, advising Mrs. Lehr of her marriage, but not disclosing her new name or whereabouts. She also told Mrs. Lehr that she and her husband desired to adopt Jessica, but were averse to going through proceedings that would involve Jonathan (J.A. 62).

At some point, when Lorraine learned that Jonathan was trying to locate her, she called him and told him to stay away or she would have him arrested (J.A. 31). Although Jonathan does

not aver that he had ever previously communicated to Lorraine any offer of financial support, he now "reaffirmed his previous desire to give financial assistance if necessary" and suggested he might set up a trust fund for Jessica (J.A. 32). Lorraine, who had by now been married to appellee Richard Robertson for a year and was apparently no longer dependent on welfare for subsistence, refused these offers (ibid.).

On December 12, 1978, approximately four months after Jonathan discovered where Lorraine and her family were living, Jonathan's lawyer wrote Lorraine on his behalf seeking visitation privileges with Jessica (J.A. 76). He received no response, and on January 8, 1979, sent a second letter, this time threatening to commence "appropriate proceedings" in the Family Court of Westchester County if no responses were forthcoming (J.A. 77).

During the previous month, on December 14, 1978, Lorraine and her husband had commenced adoption proceedings in Ulster County (J.A. 17 n.3). Jonathan did not appear to come within the categories of unwed fathers to whom notice was required to be given by New York law (N.Y. Dom. Rel. Law § 111-a (McKinney 1977)), and the adoption petition was accompanied by an affidavit

affirming that there existed no person coming within any of those categories (J.A. 135-137).

Receipt of the second letter from Jonathan's lawyer was refused, and Jonathan commenced filiation and visitation proceedings on January 31, 1979, in Westchester County (J.A. 13-14, 16n.2). The summons in those proceedings was served on Lorraine on February 22, 1979, and her response--a show cause order requesting that the proceedings be removed to Ulster County and giving March 12, 1979, as the return date for the show cause order--informed Jonathan of the adoption proceedings that had been commenced in December, noting that the hearings had been completed and that the parties were awaiting the submission of Department of Social Services investigation report and signing of the adoption decree (J.A. 17-18, 86-93). Jonathan's counsel received this response and show cause order on March 3, 1979 (J.A. 17-18). On Wednesday, March 7, Jonathan's counsel reached the Family Court Judge in the adoption proceeding by telephone. He learned that the Judge had been informed by Lorraine's counsel of the Westchester County filiation proceedings and that the Judge did not believe that notice of the adoption proceedings was required to be given Jonathan Lehr.

The Judge also stated that he had reviewed the Department of Social Services' final investigation report, and that he had, that morning, signed the adoption papers (J.A. 19-20, 65-70).

On April 23, 1979, Jonathan Lehr sought to file a notice of appeal from the adoption proceedings, but he never perfected that appeal (J.S. App. A6 n. 3). On June 20, 1979, the Westchester County filiation proceedings were dismissed (J.A. 2), and on June 22, appellant Lehr filed in the Westchester County Family Court a motion to vacate the adoption order by which Jessica Martz became the daughter of Richard N. Robertson, Jr., and to inspect the sealed records of that proceeding (J.A. 9-55). The Family Court Judge denied the motion to vacate, finding, inter alia, that Jonathan Lehr was not entitled to notice under N.Y. Dom. Rel. Law §111-a (McKinney 1977) (J.S. App. C5-C9), that the statute was a proper response to the constitutional dictates of Stanley v. Illinois, 405 U.S. 645 (1972) (J.S. App. C14-C16), and that Caban v. Mohammed, 441 U.S. 380 (1979), should not be given retroactive effect so as to confer on Jonathan Lehr a veto power over the adoption of Jessica Martz by her mother's husband (J.S. App. C18-C20).

That decision was affirmed on Jonathan Lehr's appeal to the Third Department of the New York Supreme Court, Appellate Division (J.S. App. B1-B8). The Appellate Division's order was affirmed on Jonathan Lehr's further appeal to the Court of Appeals of the State of New York (J.S. App. A1-A18). The Court of Appeals described Jonathan Lehr's contention as a claim that Sections 111 and 111-a of New York's Domestic Relations Law were unconstitutional "as denying him the equal protection and due process rights enunciated in Caban" (J.S. App. A5-A6), and it stated (id. at A6, citation omitted) that it would not reach these questions because those sections of the law were "immune from constitutional assault predicated on Caban and its rationale in the present postfinal determination proceeding." It went on to characterize Section 111-a as a statute "intended to codify the minimum protections which Stanley [v. Illinois, supra], would require" and held that the Family Court did not abuse its discretion in declining to construe the statute so as to require that Jonathan Lehr be given notice and a hearing on his claims respecting the adoption (J.S. App. A10-A11).

SUMMARY OF ARGUMENT

1. The requirements placed on the States by the Due Process Clause are triggered only by the existence of a liberty interest affected by state action. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court found a denial of due process in state procedures that affected the interest of an unwed father in the children he had sired and raised. Although Stanley was not an adoption case, it has generally been held applicable to procedures in adoption proceedings; but this Court has never held that a man who claims the paternity of a child but has never exercised custody or established a relationship with the child has a liberty interest triggering due process requirements as in Stanley.

On the facts as he alleged them in support of his motion to vacate the adoption award concerned in this case, appellant has failed to allege a liberty interest such that the Family Court judge, in the proceeding by which appellant sought collaterally to attack the adoption decree, was required to find lack of notice a constitutional defect in the adoption proceeding and to strike down Section 111-a of New York's Domestic Relations Law on the ground that it violates the Due Process Clause. Appellant's affidavit

reveals that he was an adult who chose to devote his financial resources to his education and that he was sufficiently sophisticated to seek legal advice when he felt in need of it. He failed to avail himself of opportunities during the two years prior to the adoption proceeding by which he could either have placed himself in one of the categories entitling him to notice of adoption proceedings under state law or have initiated legal proceedings that might have entitled him to visitation rights, enabling him to establish a relationship with the child Jessica that would constitute the liberty interest protected by the Due Process Clause.

The Court below was not required to strike down the New York law on the assumption that it might operate as a deprivation of the due process rights of others not before it in this case. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

2. The Equal Protection Clause prevents states from making laws based on overbroad generalizations that are "entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." Parham v. Hughes, 441 U.S. 351, 354 (1979). The law in Stanley v. Illinois, supra, with respect to removal of children from

a parent's custody gave certain rights to all unwed mothers and denied them to all unwed fathers, and because it could not properly be assumed that custodial unwed fathers were, as a class, more unfit to continue caring for their children than unwed mothers with custody, the law was struck down under the Equal Protection Clause as well as the Due Process Clause.

Putative fathers who do not exercise custody over the children they claim as theirs are not in circumstances substantially similar to those of unwed mothers. The undeniable evidence of pregnancy and birth show a mother's parental relationship to her child, and a bond is generally formed between mother and child in the first days of infancy. New York's distinction between unwed mothers and those unwed fathers who do not fit within seven specified categories, including fathers whose paternity has been proved through adjudication, accordingly does not violate the Equal Protection Clause.

Appellant's reliance on Caban v. Mohammed, 441 U.S. 380 (1979), is unjustified. First, under the tests of either Linkletter v. Walker, 381 U.S. 618 (1965), or Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), Caban should not be retroactively applied so as to unsettle adoptions that have become final in prior proceedings. Second,

the equal protection rationale of Caban should not be extended to cases in which the putative father lacks a relationship with his child comparable to that which Abdiel Caban had established with his children.

ARGUMENT

I. GIVEN APPELLANT'S ALLEGATIONS IN SUPPORT OF HIS MOTION TO VACATE THE ORDER OF ADOPTION, THE FAMILY COURT JUDGE WAS NOT REQUIRED TO FIND THAT APPELLANT POSSESSED A LIBERTY INTEREST ENTITLING HIM, UNDER THE DUE PROCESS CLAUSE, TO VACATION OF THE ADOPTION ORDER SO AS TO BE HEARD IN THE REOPENED ADOPTION PROCEEDING

It is settled that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 564, 569 (1972). In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held that an unwed father who, together with the woman with whom he had shared a home for 18 years, had raised the children born of that relationship, was entitled, "as a matter of due process of law," to "a hearing on his fitness as a parent before his children were taken from him" (id. at 649). The "private interest" identified by the Court was "that of a man in the children he has sired and raised" (id. at 651). The Court further noted that it had "frequently emphasized the importance of the family" and that the law had not "refused to recognize those

family relationships unlegitimized by the marriage ceremony" (ibid.).[2]

Although the Court has noted that "the usual understanding of 'family' implies biological relationships," (Smith v. Organization of Foster Families, 431 U.S. 816, 843 (1977)), it has also recognized that "biological relationships are not" the exclusive basis for determining "the existence of a family" (ibid., footnote omitted). And it has never held that a claim of biological connection--even a claim coupled with some evidence--is, without more, sufficient to trigger either the procedural or the substantive requirements of the Due Process Clause.

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[2]See Caban v. Mohammed, 441 U.S. 380, 414 (1979) (Stevens, J., dissenting) ("I assume that, if and when one develops, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process.")

In Quilloin v. Walcott, 434 U.S. 246 (1978), in which neither the identity of the natural father nor his right to notice and an opportunity to be heard were contested, the Court simply was not confronted with the question whether a claimant to paternity in the position of the appellant in the present case is constitutionally entitled to such due process rights.[3]

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[3]It is noteworthy that Leon Quilloin--although not a father who had "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of his child" (id. at 256), nevertheless had plainly established a relationship with the child by providing support "on an irregular basis," visiting with the child "on many occasions," and bringing him toys and gifts (id. at 251). In short, the natural father's interest involved both his biological connection and an established relationship.

In Section 111-a of its Domestic Relations Law, the State has concededly and properly been concerned not to impose notice requirements that will impose undue impediments on the adoption of children born out of wedlock and to assure that the child's permanent familial relationships can be established as early in his or her life as possible (Appellant's Br. App. D).[4] But it has also sought to establish a framework in which those concerned fathers who do establish relationships with their children or, in the case of infants, who are likely to do so, will receive notice of the proposed adoption of their child.

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[4]Groups and state agencies involved in the adoption area have observed that some legislative responses to Stanley v. Illinois, supra, represented overreactions that produced serious delays in adoptive placements of young children. Reeves, Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation, 13 Fam. L.J. 115, 132-134 & n. 91 (1973-1974). Such delays can have unfortunate psychological consequences for the children concerned. J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child, 31-37 (1979 ed. The Free Press).

Thus, for example, where the father's name appears on the birth certificate, an event that requires the mutual agreement of the mother and father at the time of the birth,[5] the father will receive notice (Section 111-a. 2(d)). Men who have filed an unrevoked notice of intent to claim paternity in the State's putative fathers' registry also receive notice, since that group undoubtedly will include within it some fathers who have established some kind of paternal relationship (Section 111-a. 2(c)).

To be sure, as appellant contends (Br. 62), the statute may be over-inclusive to the extent that it may apply to some men who have merely filed a notice of intent to claim paternity, who have established no psychological bond with their children, and who have lost any flicker of interest they may once have possessed.

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[5] N.Y. Public Health Law § 4135(2) (McKinney, 1977 & cum. supp. 1981-1982). The father in Caban v. Mohammed, supra, had participated in this initial expression of mutual commitment to the couple's children, 441 U.S. at 382.

But this likelihood should not be held to entitle appellant to notice if, in fact, he is not within the class for whom notice is constitutionally required. The Committee submits that, on the basis of the allegations made by appellant to the Family Court judge, appellant does not fall within that class.

Appellant's affidavit and that of his mother reveal that he is an individual of sufficient sophistication to seek an attorney when he feels the need of legal advice. He was 24 years of age at the time Jessica was born. The affidavits also reveal that he possessed some financial resources, but chose to devote them to his education. Significantly, he proclaimed that he had been "ready" to assume a financial support commitment during the time that Lorraine was living on welfare (J.A. 27), but took no affirmative steps to do so. After he visited with Jessica on two weekends and then was prevented by Lorraine from seeing her on following weekends, he took no steps to establish paternity and assure visitation rights--a course that was clearly open to him under New York law. See e.g., Matter of Pierce v. Yerkovich, 80 Misc. 2d 613, 614 (Fam. Ct. 1974); Anonymous v. Anonymous, 34 N.Y. App. Div. 2d 942 (1970). Rather, he asserts that he decided

to wait and see if Lorraine might change her mind at some future date.

The only offer of financial support that he claims to have made (an offer extended "if necessary") was made after Lorraine was married and living with her husband. And when appellant reestablished contact with her in August 1977, he waited four months before even seeking by letter to establish contact with Jessica.

Although, according to his affidavit (J.A. 32), appellant had knowledge of Lorraine's address for a total of nine months out of more than 24 months between Jessica's birth in 1976 and the filing of the adoption proceedings in December 1978, and although--with the exception of the two weekends on which he saw Jessica during her infancy--appellant makes it clear that Lorraine's conduct was not such as to lull him into a belief that he had no reason to explore his legal options under New York law in order to assure continuing contact with the child, appellant failed to seek legal advice or, on his own,

to explore those options.[6] He could have promptly filed a notice of intent to claim paternity, entitling him to notice of any adoption proceedings. He could have promptly initiated a filiation proceeding through which he might have secured visitation rights enabling him to establish an emotional bond with the child before she became part of a de facto family created by her mother's marriage to Richard Robertson.[7] Appellant chose, instead, to bide his time before taking any such steps.

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[6]Appellant is not in the position of putative fathers who made it clear before the birth of the child in question that they stood ready to support and raise the child themselves and who were prevented from knowing the time and place of the birth of the child. See Riggs v. Terrazas, 612 S.W. 2d 461 (Ct. App. Tenn. 1980), permission to appeal denied, Tenn. (Oct. 6, 1980), cert. denied, 450 U.S. 921 (1981); Ellis v. Social Services Dept. of Church of Jesus Christ of Latter-Day Saints, 615 P. 2d 1250 (Utah 1980).

[7]Authorities on early childhood have emphasized the importance of close, reasonably continuous contact between a child in his or her earliest years and a caring adult. As Goldstein et al. have noted (page 18, note 4, supra, Beyond the Best Interests of the Child at 17, 19):

This course of events does not brand appellant as an unworthy person or one who could not assume a proper parental role. But it did have the consequence that, when the adoption proceedings were filed, appellant had neither brought himself within any of the categories of persons entitled to notice under state law or within that class of persons such as Peter Stanley, whose identity as a father was unquestioned, who was not a stanger to his children, and who was entitled to notice by virtue of the Due Process Clause. Another consequence of the delay, as noted, was that, by the time appellant filed

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(footnote continued)

> [F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation.
>
> * * * *
>
> Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult--but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

the filiation proceeding, Jessica had lived nearly a year-and-a-half of her life of slightly more than two years in a home with her mother, sister, and the man who married her mother and made a home for them.

Because, on the basis of facts admitted by appellant, the Family Court could properly find that he was not within the class of persons to whom notice was required to be given under the holding of Stanley v. Illinois, supra, no hearing was required.[8]

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[8]Moreover, because these admissions go to the question whether appellant is within the class constitutionally entitled to notice and an opportunity to be heard in the adoption proceeding, deciding the question on the basis of his affidavits in a proceeding after the adoption order had become final is not inconsistent with the holding of Armstrong v. Manzo, 380 U.S. 545 (1965). In Armstrong the question before the Court was not whether petitioner--a divorced father--had a liberty interest entitling him to procedural rights under the Due Process Clause, but whether "whatever constitutional infirmity resulted from the failure to give [him] notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree." 380 U.S. at 551. The Court answered in the negative, finding that the State was required to accord him all of the hearing rights that he would have enjoyed had he received timely notice, including the benefit of having the burden of

And because, on the basis of those admissions, it is clear that the application of the New York law to appellant did not deprive him of any constitutional rights to which he was entitled, it is unnecessary for the Court to decide whether the statute might be unconstitutional as applied to persons in circumstances different from those of appellant--e.g., men without financial resources or education who might be less able to seek appropriate advice and to take advantage of the different courses of action open to them under state law. As this Court has frequently emphasized, "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that

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(footnote continued)

proof placed on the prospective adoptive fathers to show why the natural father's consent to the adoption should not be required. Ibid.

If appellant, by his own admissions in a proceeding in which he seeks to litigate his right to notice and an opportunity to be heard in an earlier proceeding, demonstrates that he is not entitled to that right of notice, there is no reason to restore the status quo ante as in Armstrong.

statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).[9]

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[9]Because the amendment of New York's adoption consent statute, following this Court's decision in Caban v. Mohammed, 441 U.S. 380 (1979) (see Appellant's Br. App. A), undoubtedly will have the practical effect of expanding to some degree the class of putative fathers to whom notice must be given, prudential considerations counsel against resolving the constitutional issue on a broader scale in this case. Should a case involving an indigent putative father like those referred to in the amicus brief filed by Community Action for Legal Services, Inc. (CALS Br. 55; see also Appellant's Br. 63) arise, an appropriate record might be made on the question, for example, of the degree of public awareness of the putative fathers registry, particularly among those whose educational and socioeconomic status make them less able to inquire into state procedures for securing and protecting parental rights.

II. SECTION 111-a OF NEW YORK'S DOMESTIC RELATIONS LAW DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE NONCUSTODIAL PUTATIVE FATHERS AND UNWED MOTHERS ARE NOT SIMILARLY SITUATED WITH RESPECT TO THE CHILDREN THEY CLAIM AS THEIR OWN

A. Applicable Principles

As explained in Point I, supra, Stanley v. Illinois concerned a father who had participated in the raising of his children, and the right at stake was the removal of children from a parent's custody without the provision of hearing procedures meeting the requirements imposed by the Due Process Clause. Stanley also held (430 U.S. at 658) that Illinois laws under which custody could be thus terminated violated the Equal Protection Clause. There was little discussion of the latter holding, but since the Illinois law gave certain rights to all unwed mothers who have custody of their children and denied them to all unwed fathers having custody, it was perhaps unnecessary.

Section 111-a of the New York Domestic Relations Law does not draw such a distinction. Rather, it provides for notice of adoption proceedings to all unwed mothers and, as to unwed fathers, provides for notice to every father who

is adjudicated the biological father and whose parenthood is thus as securely established as it is in the case of biological mothers through the undeniable evidence of pregnancy and birth. Clearly, because mothers and such fathers are similarly situated with respect to the evidence of their biological connection to their children, it would violate the Equal Protection Clause to require that notice of adoption proceedings be given to unwed mothers and not to such adjudicated fathers, for "the State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." Parham v. Hughes, 441 U.S. 351, 354 (1979). Accord, Reed v. Reed, 404 U.S. 71, 77 (1971) (dissimilar treatment of men and women who are similarly situated violates the Equal Protection Clause).

In addition, the statute provides for notice to men who have not been adjudicated fathers, but for whom there is some evidence that they may be fathers, e.g., those whose names are on the birth certificates, those who have, prior to the commencement of the adoption proceeding, filed notices of intent to claim paternity with a registry maintained by the State, and those

whose paternity is attested to by sworn written statement of the mother. At least prior to Caban v. Mohammed, 441 U.S. 380 (1979), it could reasonably be urged that the failure of the State to define even more broadly the class of putative fathers to whom notice is required to be given might raise questions under the Due Process Clause but would not raise Equal Protection questions because "the statutory classification is realistically based upon differences in [the] situations" of men and women--the fact that unwed fathers whose claims of parenthood have not been established through such means as bloodtests cannot be reliably identified as fathers, whereas unwed mothers are necessarily identified at the birth of their child as its parent. Parham v. Hughes, supra, 441 U.S. at 354; Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).[10]

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[10] We are aware that the decisions in Caban and Parham were announced on the same day; but the legal principles relied on in Parham were, nonetheless, settled ones, and--as we note below--the holding in Caban may well be limited to fathers like Abdiel Caban, who had lived with their children or otherwise established psychological bond. Such men are more likely than other unwed fathers to be biological fathers of the children.

Thus, although the court below may perhaps be faulted for not giving more attention to Stanley in connection with the Due Process Clause attack on the statute, it was surely justified in concluding (J.S. App. A-5 to A-6) that the force of the Equal Protection attack derived from Caban, in which the majority, to some degree, rejected the dissenting view (441 U.S. at 404-407) that differences between men and women with respect both to certainty of parental identity and contact with the child at birth and immediately thereafter "justify some differential treatment of the mother and father in the adoption process." For the reasons set forth in Part C, below, we do not believe Caban should be extended to any case in which the claimant to paternity has not supported the child or established a psychological relationship with the child. But regardless of the reach of Caban, we also submit that its Equal

Protection rationale should not be applied retroactively so as to unsettle adoption decrees, whether on the basis of a denial of Equal Protection as to notice or a denial as to the requirement of consent.[11]

B. Caban v. Mohammed Should Not Be Given Retroactive Effect So as to Affect the Equal Protection Analysis in this Case

The present case is not a direct appeal from the adoption proceeding, but rather a collateral attack on the final adoption order. It is, moreover, a civil proceeding, and, for that reason the Court could reasonably determine, without any balancing of factors, that Caban should not be applied retroactively so as to unsettle this adoption or any other adoption that might, in

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[11] We agree with the amicus Community Action Legal Services (CALS Br. 63) that this Court need not reach the question whether, under Caban, state law must treat putative fathers such as appellant in the present case in exactly the same manner as it treats unwed mothers with respect to the requirement of consent to adoption. If the Court determines that appellant was not denied due process or the equal protection of the law by not receiving notice of the adoption proceeding, then a fortiori, he need not be permitted to preclude an adoption by withholding his

the future, be subjected to a collateral attack on the basis of Caban. Mackey v. United States, 401 U.S. 667, 683 n.2 (1971) (Harlan, J., concurring).

Assuming, however, that the rule to be applied is either that set forth in Linkletter v. Walker, 381 U.S. 618 (1965), respecting the effect of changes in the law on prior final judgments or, as Justice Stevens has suggested (Caban v. Mohammed, supra, 441 U.S. at 416), the rule set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), which was, in some respect derived from Linkletter, the same result should obtain. In Linkletter , a case involving, inter alia, a collateral attack on a criminal conviction, the Court held (381 U.S. at 627; citation omitted):

> "Under our cases it appears * * * that the effect of [a] subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations. . .

(footnote continued)

consent. If the Court reverses the New York Court of Appeals and orders that the adoption proceeding be reopened so that appellant may participate, then it could permit the lower courts to resolve the consent question in the first instance.

> and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.'"

A holding that Caban could be relied on to invalidate adoption awards might affect not only step-parent adoptions, as in the present case--where the child may remain in the same home, notwithstanding the vacation of the adoption award, because he or she is already living with one of the natural parents. It might also affect adoptions by parents, neither of whom is biologically related to the child, who would then be faced with defending their parenthood and custody against the claims of a man who had never been adjudicated the child's father. In most cases, the child--particularly if he or she were adopted at a very young age--can be expected to have established primary familial bonds with the adoptive parents (see pages 22-23, note 7, supra). As Justice Stevens noted in Caban, "family and financial decisions have been made in reliance on the validity of [adoption] decrees." 441 U.S. at 415.[12] It would not serve any rational

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[12]Although Justice Stevens wrote as a dissenter, his views in the retroactivity vel non of Caban are not in conflict with anything in the majority opinion.

public policy to subject those families to the emotional trauma of requiring the mother and father to defend the parental rights that they acquired through judicial proceedings fully in accord with the law of their state and that they have exercised through daily care of the child, who, now, undoubtedly looks upon them as mother and father. Surely parental rights thus acquired should be held vested, and the desideratum of repose in judgements here, above all, respected.

Similarly, under the three-prong test of Chevron Oil Co. v. Huson, supra, the rationale of Caban should not be given retroactive effect. First, as we have suggested above (pages 28-29, supra), until Caban, those making the law and those relying on it would have no reason to believe that states would be required, in their laws respecting the adoption process, to treat biological mothers as if they were similarly situated to putative fathers who had never been adjudicated the father of the child and had never exercised custody. In addition, the Court had, just three years prior to its ruling in Caban, upheld the constitutionality of the New York statute respecting consent--the same statute at issue in Caban. Orsini v. Blasi,

423 U.S. 1042 (1976) (dismissed for want of a substantial federal question). Thus, it cannot be said that the 5-4 decision in Caban was "clearly foreshadowed" by previous precedents. Chevron Oil Co. v. Huson, supra, 404 U.S. at 106.

Second (id. at 107), retrospective application of the rationale of Caban as applied to notice requirements would not significantly advance its purposes, because its purpose--to give unwed fathers (or, as in the present case, one who proposes to prove himself an unwed father) rights equal to those of unwed mothers--is simply impossible to achieve once an adoption has been decreed and the child has formed a filial relationship to the adoptive parents. Irreversible psychological developments have almost certainly taken place and the status quo ante cannot be restored. Finally, as suggested above in the discussion of Linkletter, retroactive application of Caban so as to unsettle final adoption decrees would be manifestly unjust, even if it did not remove a child from the home that he had come to accept as his own, but merely removed from him the legal tie to the man he had come to accept as his father or his acquisition of the family name. Chevron Oil Co. v. Huson, supra, 404 U.S. at 107.

C. Caban v. Mohammed Should Not Be Extended to Cases in Which the Putative Father Has Never Exercised Custody Over the Child or Provided Support

In Caban, the Court expressly declined to express any view whether a statute "addressed particularly to newborn adoptions, setting forth more stringent requirements concerning the acknowledgement of paternity or stricter definition of abandonment" might make gender-based distinctions without violating the Equal Protection Clause. The Court thereby emphasized the limits of the case before it--a case in which the man claiming parental rights as a father had lived, as a father, with his children for several years and had visited them after his relationship with their mother ended. In such a case, the unwed mother and the man claiming rights as the father are, if not as similarly situated as the custodial fathers in Stanley was to custodial mothers, nevertheless closer in their circumstances with respect to the certainty of their identity as a biological parent and their emotional bonds to the children than are unwed mothers and putative fathers who have never exercised custody or provided support.

We submit that the Equal Protection rationale of Caban should not be extended to any case in

which the positions of unwed mother and putative father are so dissimilar. If there are special circumstances that appear to justify according parental rights to the man who steps forward promptly to prove his paternity (see page 22, note 6 , supra), those rights properly derive from the Due Process Clause and not from the Equal Protection Clause.

Finally, the Committee urges that, should the Court reverse the judgment below on any ground, it take care not to issue a broad ruling that goes beyond the particular contours of the present case. Thus, should the Court be influenced in the present case by the unusual sequence of events--in particular, the putative father's filing of the filiation proceeding while the adoption proceeding was pending and the fact that the putative father's claim was made known to the adoption court--it need not apply its holding to cases in which no such filiation proceeding has been filed prior to the signing of the adoption order. We submit, for all of the reasons heretofore stated, that the Court may properly affirm the judgment in this case; but because the interests of so many adoptive parents and children could be affected by any ruling suggesting that their settled family

relationships may be threatened by collateral proceedings based on Caban v. Mohammed, we urge that care be taken to avoid such a consequence, whatever the ultimate ruling in this case.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be affirmed.

Respectfully submitted,

Elinor Hadley Stillman
Attorney for the National
Committee For Adoption, Inc.
4424 Albemarle St., N.W.
Washington, D.C. 20016
(202) 363-9145
(202) 463-7559

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Amicus Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JONATHAN LEHR,

Appellant,

—against—

LORRAINE ROBERTSON and RICHARD N. ROBERTSON, JR.

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF COMMUNITY ACTION FOR LEGAL SERVICES, INC., BROOKLYN LEGAL SERVICES CORPORATION "A", AND QUEENS LEGAL SERVICES CORPORATION

LOUISE GRUNER GANS
COMMUNITY ACTION FOR LEGAL SERVICES, INC.
335 Broadway
New York, New York 10013
(212) 431-7200

STANLEY A. BASS
QUEENS LEGAL SERVICES CORP.
29-28 41st Avenue
Long Island City, New York 11101
(212) 392-5646

GARY R. CONNOR
SHIRLEY STARK
BROOKLYN LEGAL SERVICES CORP. "A"
260 Broadway
Brooklyn, New York 11211
(212) 782-6195

Attorneys for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Community Action for Legal Services, Inc., Brooklyn Legal Services Corporation "A", and Queens Legal Services Corporation respectfully move, pursuant to Rule 36 of this Court's Rules, for permission to file the within brief Amicus Curiae in Lehr v. Robertson, by reason of the Amici's substantial interest in the outcome of this case and their considerable experience in litigation concerning the issues presented herein.

The attorneys for all parties to this appeal have been requested to consent to the filing of this brief. Counsel for Appellant has granted his consent;* both Appellees have refused to give their consent.

*His letter of consent has been filed with the Clerk of Court.

INTEREST OF AMICUS CURIAE

Community Action for Legal Services, Inc., ("CALS") is the largest civil legal services program in the nation. Funded by the National Legal Services Corporation as successor to the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal services to indigent New York City residents who cannot afford to pay a private attorney. CALS has a full time staff of over 120 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than 40,000 persons a year. CALS attorneys provide representation in all trial courts in New York City, in the State and Federal Appellate Courts and in this Court. Brooklyn Legal Services Corporation "A" and Queens Legal Services Corporation are two of CALS' delegate corporations. Their neighborhood offices are located in the Williamsburg and East New York Sections of Brooklyn and in

Jamaica and Long Island City, Queens respectively.

Approximately 20% of the cases handled by CALS neighborhood legal services offices, including Brooklyn Legal Services Corporation "A" and Queens Legal Services Corporation, are in the area of family law. These cases include a significant number involving the termination of parental rights to and adoption of children, including children born out-of-wedlock.

Attorneys associated with CALS and its delegates, including Brooklyn Legal Services Corporation "A" and Queens Legal Services Corporation, have litigated constitutional issues involving state intervention in the family before this Court in Smith v. Organization of Foster Families, 431 U.S. 816 (due process claims of foster parents in relation to foster children and their natural parents). and as amicus curiae in Santosky v. Kramer, ___U.S.____(1982) (termination of parental

rights) and Caban v. Mohammed, 441 U.S. 390 (1979) (termination of parental rights of unwed father).

In addition to considerable experience with the kinds of constitutional issues presented here, and specifically, substantial knowledge and experience concerning the nature of family relationships involving children out of wedlock, these attorneys have extensive first hand knowledge of the operation of the statutes governing termination of parental rights and adoption in the State of New York and of the putative father's registry.

This appeal presents a constitutional question of great importance to large numbers of indigent clients who have children out of wedlock, namely, wehther unwed fathers whose identity is known and ascertainable, but who do not fit within the categories of unwed fathers specified by N.Y.D.R.L. §111-a may, have their relationship to their children permanently

terminated without any notice or opportunity to be heard whatsoever. Amici, wish to submit their brief because of their concern about the impact of this case on their clients and because they hope to be able to present to the Court an analysis of the issues from the standpoint of the indigent unwed father which may not otherwise be presented.

Wherefore, Community Action for Legal Services, Inc. ("CALS"),Brooklyn Legal Services Corporation "A" and Queens Legal Services Corporation respectfully request leave to file

the attached brief as Amicus Curiae.

Respectfully Submitted,

LOUISE GRUNER GANS
COMMUNITY ACTION FOR
LEGAL SERVICES, INC.
335 Broadway
New York, New York 10013
(212) 431-7200

STANLEY A. BASS
QUEENS LEGAL SERVICES CORP.
29-28 41st Avenue
LONG ISLAND CITY, NEW YORK 11101
(212) 392-5646

GARY R. CONNOR
SHIRLEY STARK
BROOKLYN LEGAL SERVICES
CORP. "A"
260 Broadway
Brooklyn, new York 11211
(212) 782-6195

Attorneys for Amici Curiae

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BRIEF AMICUS CURIAE OF COMMUNITY ACTION FOR LEGAL SERVICES, INC., BROOKLYN LEGAL SERVICES CORPORATION "A", AND QUEENS LEGAL SERVICES CORPORATION.

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INTEREST OF AMICI CURIAE

The interest of Amici Curiae is set forth in the accompanying motion, supra.

STATEMENT OF THE CASE

This case is before this Court on appeal from a decision of the Court of Appeals of the State of New York, issued November 24, 1981, affirming a decision of the Supreme Court of the State of New York, Appellate Division, Third Department, issued December 11, 1980, which in turn affirmed the decision of the Family Court of the State of New York, County of Ulster, issued November 26, 1979. In its decision, the Family Court refused to vacate an adoption order and held that appellant, a putative father, was not a person entitled to notice of the adoption proceeding either under N.Y.Dom.Rel.§§111, 111-a, or as a constitutional matter, even though he had, prior to the entry of the adoption order, and with full knowledge of the child's mother and the adoption

court, commenced a paternity proceeding seeking to have himself judicially declared the child's father.

The Family Court did not conduct a hearing on the factual issues raised by the parties on the motion to vacate the adoption. Consequently, the available record only shows the conflicting contentions of each side.

The appellant, Jonathan Lehr, asserts that he is the father of Jessica, born November 9, 1976. According to him, he and Jessica's mother, Lorraine Robertson, first met in 1971. In 1974 they began to live together; he was 22 and she was 19 years old. The couple lived together for the next two years, until Jessica's birth.

Mrs. Robertson (formerly Ms. Martz) does not deny Mr. Lehr's paternity, but pointedly states that she never admitted it in a legal proceeding. She concedes that she and Mr. Lehr lived together during the two years prior to

Jessica's birth, but not continuously.

According to Mr. Lehr, during her pregnancy and after the birth of Jessica, Mrs.Robertson acknowledged to relatives, friends, her physician, and the Department of Social Services that Mr. Lehr was Jessica's father. She was a recipient of public assistance,* while Mr. Lehr was a student working his way through school.

Although, after Jessica was born, Mr. Lehr repeatedly visited Mrs. Robertson and Jessica at the hospital, upon her discharge Mrs. Robertson chose not to return to live with Mr. Lehr. According to Mr. Lehr, between November 1976 when Jessica was born and until August 1978, when he located her with the help

*Recipients of public assistance in the AFDC category are required, as a condition of eligibility, to disclose the name and addrees of their child's father. 18 N.Y.C.R.R. §369.2(b). Since Mr. Lehr had no opportunity to participate in the adoption proceeding he was unable to subpoena the Social Services records which might,in fact,contain a written acknowledgment of his paternity.

of a detective agency, Mrs. Robertson concealed her whereabouts from him. There was only an interval of several months when she contacted him and permitted him several visits with Jessica. However, when Mr. Lehr informed her that due to school and financial obligation he was unable to marry her, Mrs. Robertson and Jessica disappeared again.

By the time Mr. Lehr again located Mrs. Robertson,in August, 1978, she was already married to Mr.Robertson. At this time, Mrs. Robertson threatened Mr. Lehr with arrest unless he stayed away and refused to let him see Jessica.

Mrs. Robertson admits that after her marriage to Mr. Robertson in August, 1977 her whereabouts were unknown to Mr. Lehr for approximately 9 months. Otherwise, she claims that she was accessible to Mr. Lehr and that only his lack of interest prevented him from seeing Jessica.

By December 12, 1978 Mr. Lehr had retained legal counsel who wrote to Mrs. Robertson requesting visitation with Jessica for Mr. Lehr, and threatening legal action on his behalf.

In apparent response to this request, and without giving notice to Mr. Lehr, Mrs. Robertson and her husband, Richard N. Robertson, commenced an adoption proceeding in the Ulster County Family Court on Cecember 21, 1978 seek- the adoption of Jessica by Mr. Robertson.

The adoption petition made no mention of Mr. Lehr, or, of any other person identified as Jessica's father. The petition merely stated that the child was born out-of-wedlock and that the father's consent to the adoption was unnecessary. Mrs. Robertson also filed an affidavit, which obviously tracked the language of N.Y.D.R.L.§111-a, in order to show that there was no person entitled to notice as Jessica's putative father pursuant to that statute.

Mr. Lehr, unaware of the pendency of the adoption proceeding, meanwhile commenced a paternity proceeding in the Westchester County Family Court. In his paternity petition, sworn to under oath before the Clerk of that Family Court on January 30, 1979, Mr. Lehr asserted that he was the father of Jessica and that Mrs. Robertson had denied him visitation with the child. He prayed for an adjudication of paternity and for visitation rights.

On February 21, 1979 the Clerk of the Westchester County Family Court in the paternity proceeding, issued a summons for Mrs. Robertson which she received with the petition on February 22, 1979. On February 29, 1979, Mrs. Robertson's counsel secured from the Hon. Hugh Elwyn, the Family Court Judge before whom the adoption was pending, an order to show cause directed to Mr. Lehr. The order, returnable on March 12, 1979, stayed the paternity proceeding, pending determination whether the

venue of that proceeding should be changed to Ulster County.

Upon receipt of the order to show cause on March 3, 1979, Mr. Lehr learned for the first time of the pendency of the adoption proceeding. But,when counsel for Mr. Lehr telephoned Judge Elwyn on March 7, 1979, the Judge informed him that he had already signed the adoption order that morning . While aware of Mr. Lehr's paternity proceeding, the Court believed that Mr. Lehr was nevertheless not entitled to notice of the adoption.

The order of adoption was signed while the stay of Mr. Lehr's paternity proceeding was in effect. The paternity petition was dismissed as moot on June 20, 1979. Mr. Lehr had not filed a Notice of Intent to Claim Paternity with New York's putative father's Registry, N.Y. S.S.L. §372-c; he asserted that he had not known of its existence.

On June 22, 1979, Mr. Lehr moved by

order to show cause to vacate the order of adoption, to reopen the adoption proceeding and to grant him access to the records of that proceeding. The motion to vacate was based, in part on the unconstitutionality of N.Y. D.R.L. §§111 and 111-a. Mr. Lehr claimed, inter alia, that he was entitled to notice and an opportunity to be heard in the adoption proceeding as a matter of procedural due process, as well as on equal protection grounds. Further, he claimed that, as a matter of substantive due process and equal protection, his child Jessica could not be adopted without his consent unless he was proven unfit; at the least, he claimed, he was entitled to notice and hearing as to whether the proposed adoption was in the best interest of the child, as afforded to other unwed fathers under N.Y. D.R.L. §111-a.

On April 24, 1979, this Court issued its decision in Caban v. Mohammed, 441 U.S. 380.

The Court held that N.Y.D.R.L. §111.1(c), requiring the consent of the natural mother to the adoption of an out-of-wedlock child, but not of the father, was invalid under the Equal Protection Clause of the Fourteenth Amendment.

In his briefs, including his brief to the New York Court of Appeals, appellant Lehr argued both that Caban was dispositive of his claims and that,in any event, his procedural and substantive claims were supported by Stanley v. Illinois, 405 U.S. 645 (1972).

The Family Court, Ulster County, denied Mr. Lehr's motion to vacate and reopen the adoption and for access to the adoption records. The Appellate Division of the Supreme Court of the State of New York, Third Department, affirmed, Matter of Adoption of Jessica XX, 77 A.D. 2d 381, as did the New York Court of Appeals, Matter of Adoption of Jessica XX, 54 N.Y. 2nd 417.

RELEVANT NEW YORK STATUTORY PROVISIONS

New York Domestic Relations Law §111 specifies the persons whose consent to the adoption of a child is required. Until this Court's decision in Caban v. Mohammed, 441 U.S. 380, a child born out-of-wedlock could be adopted upon the consent of the child's mother alone. The consent of the child's father was not required, Caban v. Mohammed, 441 U.S.387, 390 n.8.

However, Domestic Relations Law §111-a, which complements §111, provides for notice of of adoption proceedings to certain fathers of children born out-of-wedlock, even though their consent to the adoption is not required.

Pursuant to Dom. Rel. L. §111-a.2, enacted by Chapter 665 §3 of the Laws of New York 1976, unwed fathers entitled to notice of adoption proceedings include the following:

> "(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three-hundred seventy-two-c fo the Social Services Law;

(c) any person who has timely filed an unrevoked notice to intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the Social Services Law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child or child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in a written,sworn statement; and

(g) any person who has married the child's mother subsequent to the birth of the child." *

The purpose of the notice is to provide fathers in any of the specified categories with an opportunity to be heard and to present

* Amendments to §111-a have been made since 1976, but have no bearing on this case.

evidence as to whether the proposed adoption is in the child's best interest, Dom.Rel. L. §111-a.3.

Dom. Rel. L. §111-a was specifically enacted by New York in an attempt to comply with the mandates of Stanley v Illinois, 405 U.S. 645 (1972), see Memorandum in Support, Governor Hugh Carey, 1976 McKinney's Session Laws 2442.

By limiting the notice requirement to certain specified categories of unwed fathers, the Legislature rejected the view that all persons believed to be the father of a child must be given notice of adoption proceedings, as some New York courts had interpreted Stanley to require, see In Matter of Donna P., 80 Misc. 2d 129 (Fam. Ct. N.Y. Co. 1974).

Further, in enacting §111-a, the Legislature, in virtually every instance, placed the burden on the father to make sure that his rights were protected. Neither the state, nor the mother, is required to identify or ascertain

who the father is. Indeed, the mother is not even requested to provide the father's name on the adoption petition itself.

Dom. Rel.L. §111-a provides that fathers of children born out-of-wedlock, who filed a "notice of intent" to claim paternity with the state putative father Registry, were entitled to notice of a proposed adoption of their child.

Since 1977, N.Y. Social Services Law §372-c has required the New York State Department of Social Servies to maintain a statewide Registry where, inter alia, the names and addresses of fathers whose paternity has been adjudicated shall be recorded. Additionally, any person may file a "notice of intent" to claim paternity of a child with the Registry. The "notice of intent" may be revoked at any time, S.S.L.§372-c.4, and need not be signed under oath, see official form of "notice of intent" attached as Appendix 1, infra.

While it may have been the intention of the Legislature to set up a registry wherein putative fathers could voluntarily file a Notice of Intent to claim paternity and thereby protect their rights, in fact, the Registry has recorded only approximately 600 such cases from its inception in 1977 through May 3, 1982. The remaining 42,940 names which appear in the Registry are all adjudicated fathers, filed as a result of notification from a court after such adjudication.*

One explanation for the astonishingly low number of fathers who voluntarily placed their names with the Registry may be the lack of publicity it has been given. No listing for the Registry appears in the New York City

*Official statistics on this subject are unavailable. Amici Curiae obtained this information from Ronald Speier, a senior staff attorney at the New York State Department of Social Services, Bureau of Child Welfare Services Law.

Telephone Directory, or is available from Directory Assistance operators. In Amici's experience, there is even confusion among some Family Court Clerks as to whether referrals to the Registry can be made prior to an adjudication of paternity. Essentially, the Registry serves as a computer base for names and addresses of unwed fathers whose paternity has already been adjudicated.*

Dom Rel. L. §111 contains its own notice provision, §111.3, which authorizes an adoption court to give notice of a proposed adoption to persons whose consent to the adoption is not required. The New York Court of Appeals has interpreted this provision not to authorize even discretionary notice to unwed fathers not specified in Dom.Rel. L.§111-a, Matter of Adoption of Jessica XX, 54 N.Y. 2d 417.

*The written acknowledgements of paternity regularly collected by the Department of Social Services pursuant to 18 N.Y.C.R.R. §369.2(b), are not forwarded to the Registry. Nor does the Family Court notify the Registry when a paternity petition has been filed.

In 1980 Dom. Rel. L. §111 was amended to comply with this Court's ruling in Caban v. Mohammed, supra. Pursuant to §111.1(d), consent of the father to the adoption of his out-of-wedlock child is required in two situations: first, in the case of a child over the age of six months, the father must have continuously supported the child, according to his means, and must have either visited the child at least monthly, or, if prevented from doing so, must have maintained regular communication with the child or its caretaker; second, in the case of a child under the age of six months, the father must have openly lived with the mother for six months prior to the adoptive placement, must have held himself out to be the child's father, and, must have contributed to the medical costs connected with the mother's pregnancy and the delivery of the child.

Fathers who meet these requirements may have their consent dispensed with upon a

showing of abandonment, deprivation of civil rights, mental illness or mental retardation, Dom.Rel. L.§111.2.

Should this Court uphold Mr. Lehr's claim that he was entitled to be notified of and to be heard in connection with the proposed adoption of Jessica,and remand the case to New York for further proceedings, Mr. Lehr will, presumably, have an opportunity to establish the facts necessary to determine whether his consent to Jessica's adoption was required, or, alternatively, whether the adoption would be in her best interest.

THE DECISION BELOW

In its decision, the New York Court of Appeals took note of appellant's two principal arguments:

> "He asserts that as Jessica's father he had a constitutional right to receive formal notice of the adoption proceeding (and thus to participate therein), and that granting the order adoption without his consent deprived

him of his constitutional rights..."

and

> "He argues that to the extent that section 111-a did not require that he be given formal notice of the adoption proceedings, and that section 111 did not provide that his consent was required before Jessica could be adopted, each section is unconstitutional as denying him the equal protection and due process rights enunciated in Caban."

The Court of Appeals, relying upon Matter of Malpica-Orsini, 36 N.Y. 2d 568 (1975), apl. dism'd, sub. nom. Orsini v. Blasi, 423 U.S. 1042 (1976), found that, despite Mr. Lehr's filing of a paternity action to be adjudicated the father of Jessica, which filing was known to the adoption court, appellant had nc rights whatsoever regarding her. And, the Court of Appeals stated:

> "We hold that sections 111 and 111-a of the Domestic Relations Law as invoked in the adoption proceeding here are immune from constitutional assault predicated on Caban and its rationale..."

Although, the Court of Appeals did not explicitly state, in so many words, that it

overruled the procedural due process claim predicated upon Stanley v Illinois, supra, it is clear from its reference to "Caban and its rationale" and from its interpretation of Malpica-Orsini, supra, as denying him any rights, that it effectively rejected the Stanley argument. *

*Moreover, the Court of Appeals declined to hold that Mr. Lehr was entitled to notice of the adoption proceeding pursuant to the Court's discretionary powers, Dom.Rel.L. §111.3. At first blush, it does not appear that Dom.Rel. L. §111-a actually prohibits the giving of notice to appellant, since subsection 1 thereof reads:"in addition to the notice requirement of any law pertaining to persons other than those specified in subsection two of this section" (emphasis supplied), and §111 subsection 3 states that "Notice of the proposed adoption... may be afforded to a parent whose consent to the adoption may not be required.... if the judge or surrogate so orders.(emphasis supplied).
However, the Court of Appeals, being the definitive interpreter of the State's laws, ruled that, had the Family Court exercised its apparent discretion to grant the notice to Mr. Lehr, it would have contravened legislative intent.
Thus, as construed by the New York courts, it is the statute (§§111 and 111-a) which deprived appellant of notice and opportunity to be heard. Since appellant's counsel explicitly challenged the constitutionality of these statutory provisions in his state court submissions, which challenges were effectively rejected, there is jurisdiction in the Supreme Court to review the judgment of the Court of Appeals under 28 U.S.C. §1257 (2).

QUESTIONS PRESENTED

1. Whether New York Domestic Relations Law Sections 111 and 111-a offend procedural due process by failing to require an adoption court to give notice and an opportunity to be heard to a putative father, whose claim to paternity of the child to be adopted is known to the parties and to the court?

2. Whether Equal Protection of the Laws is violated by New York Domestic Relations Law Section 111-a, which provides notice and opportunity to be heard to putative fathers who give mere constructive notice of their claim of paternity, but which deny it to a putative father who gives actual notice of his claim?

SUMMARY OF ARGUMENT

1. An adoption proceeding is a proceeding for termination of parental rights. Its consequence is the ultimate deprivation of a fundamental civil right: the right of a parent to the "care, custody, management and companionship" May v. Anderson, 345 U.S. 528, 533 (1953) of his minor child. The right is equally fundamental and the deprivation equally severe whether the child to be adopted is legitimate or illegitimate, Stanley v. Illinois, 405 U.S.645 (1972), and whether or not the child has been in the parent's custody.

The infrigment of parental liberty interests by adjudication invokes the protection of the due process clause and requires provision of notice and an opportunity to be heard. The approval of an adoption of a child born out-of-wedlock without notice to the putative father or right

to be heard, while his identity and acknowledgment of paternity was known to the parties and to the adoption court, blatantly contravenes due process guarantees.

The risk of erroneous termination of such a father's parental rights is incalculable because his interest in and relationship with the child are not even considered. Further risk of error is present because the ex-parte adoption is approved on the basis of the vague"best interest of the child standard."

The state's desire to avoid giving notice to unknown putative fathers does not require known ones to be ignored and failure to provide notice undercuts rather than enhances the finality of adoptions. The availability of a putative father's Registry for the recording of interest in paternity was unknown to appellant,as it is to other putative fathers. The Registry cannot serve as a

substitute or condition for the provision of notice and opportunity to be heard. Notice and opportunity to be heard must be provided in connection with the proposed adoption of his child to the putative father who is known to the parties and to the adoption court.

2. New York Domestic Relations Law, §111-a, provides notice and opportunity to be heard in adoption proceedings to putative fathers who file a notice of intent to claim paternity with a putative father's Registry maintained by the state. The notice is executed without formality and is revocable at any time. Appellant, like most other putative fathers was unaware of the existence of the putative father's Registry. After he commenced a paternity proceeding by written petition in which he acknowledgedpaternity under oath, appellant was held not entitled to notice of the proposed adoption of his child

even though the adoptive parents and the adoption court knew who and where he was and had actual notice of his formal claim of paternity.

The provision of notice and an opportunity to be heard to a putative father who merely files an administrative notice of intent to claim paternity, and its denial to a putative father who actually files a a verified petition in court acknowledging his paternity is irrational and denies equal protection of the laws.

POINT I

AN ADOPTION COURT IS REQUIRED BY THE DUE PROCESS CLAUSE, TO GIVE NOTICE AND OPPORTUNITY TO BE HEARD TO A PUTATIVE FATHER WHOSE CLAIM TO PATERNITY OF THE CHILD TO BE ADOPTED IS KNOWN BY THE COURT.

By its decision, Matter of Jessica XX, 54 N.Y. 2d 417 (1981) the New York Court of Appeals affirmed the constitutionality of New York Dom. Rel. Sections 111 and 111-a as they existed in March of 1979. The court ruled that in an adoption proceeding brought by the appellees (the mother of a child born out of wedlock and her new husband), appellant (the child's putative father) whose identity, whereabouts and assertion of paternity were known to the parties and to the court, was not entitled to notice and an opportunity to be heard because he did not fit within one of the categories of out-of-wedlock fathers defined in N.Y. Dom Rel. L.

Section 111-a.*

In order to justify this ruling, the Court of Appeals held that unless the putative father fit within one of the categories enumerated in D.R.L. Section 111-a, he had no cognizable interest in the adoption proceeding.

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*E.g. Appellant was not an adjudicated father, had not filed with the Putative Father Registry, his name was not on the child's birth certificate, he was not currently living with the child's mother, he had not married the mother, and there was no evidence that she had acknowledged his paternity in writing under oath. For full text of Section 111-a(2) see pp. 10-11, supra.

> There was no reason to consider any possible rights that the petitioner might have inasmuch as our court, and apparently the Supreme Court had recently declared that he had none. (Cf. Matter of Malpica-Orsini, 36 N.Y. 2d 568, 370 N.Y.S. 2d 511, 331 N.E. 2d 486, app. dism. sub. nom. Orsini v. Blasi, 423 U.S. 1042, 96 S. Ct. 765, 46 L.Ed. 2d 631.
>
> Matter of Jessica XX, 54 N.Y. 2d 417

In so ruling the New York Court of Appeals seriously misinterpreted its own decision in Matter of Malpica-Orsini, 36 N.Y. 2d 568, appeal dism. sub. nom. Orsini v. Blasi, 423 U.S. 1042 and ignored the decisions of this Court. Under this ruling and pursuant to N.Y.D.R.L. Section 111-a, even the father in Stanley v. Illinois, 415 U.S. 645 (1972) would not have been entitled to notice and an opportunity to be heard prior to the adoption of his children.*

*The Court's opinion in Stanley does not discuss the children's birth certificates or whether their mother had acknowledged paternity in writing. The Court's opinion strongly suggests that these factors would not have been dispostitive in any event.

In Malpica-Orsini, the New York Court of Appeals had held that the rights of an unwed father were sufficiently protected under the Fourteenth Amendment if he was given notice of his children's proposed adoption and an opportunity to be heard on the question whether the adoption was in the children's best interest. Id. 36 N.Y. 2d 576-577. Rejecting the unwed father's claim for greater rights than this, the Court of Appeals held that the consent of the unwed father to his children's adoption, under N.Y.D.R.L. Section 111 was not constitutionally required.

The appeal to this Court in Orsini v. Blasi, supra was precisely from the ruling that the unwed father's consent need not be required pursuant to N.Y. D.R.L. §111. This Court's

dismissal of that appeal for lack of a substantial federal question* was necessarily limited to the consent issue and left in place the procedural and substantive rights which had been afforded by the New York Courts to the unwed father in Malpica-Orsini and other cases in light of Stanley v. Illinois, 405 U.S. 645, e.g. Doe v. Department of Social Services of Poughkeepsie 71 Misc. 2d 666, 337 N.Y.S. 2d 102 (Sup. Ct. Dutchess Co. 1972), Matter of Donna P., 80 Misc. 2d 129, 362 N.Y.S. 2d 370 (Fam. Ct. N.Y. Co. 1974).

Thus the Court of Appeals' reasoning that on the basis of Malpica-Orsini, the appellant Lehr, not being statutorily entitled to notice pursuant to D.R.L. §111(2), 111-a

*That ruling was subsequently overruled by Caban, supra at 390, fn. 9

and without benefit of Caban v. Mohammed, 441 U.S. 380 (1979) had no possible rights in relation to the adoption of the child Jessica was incorrect.

Prior to this Court's ruling in Caban, it was well settled that the Due Process Clause of the Fourteenth Amendment applies to state adoption proceedings, and that it protects a father's fundamental right to notice and an opportunity to be heard before his parental rights are effectively extinguished. In Armstrong v. Manzo, 380 U.S. 545, 550-551 (1965), the Court held that the failure of the mother and her successor husband to notify the divorced father of the pendency of the proceedings brought by them to adopt the father's daughter, deprived the father of "all that parenthood implies" Id., 550, without due process of law, so as to render the adoption constitutionally invalid.

The Court in Manzo, supra, quoted from its previous decisions as follows:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.... Id. at 550.

The decision in Armstrong v. Manzo rested upon the recognition of the rights of parents to the "care, custody, management and companionship" of their children as liberty interests "far more precious than property rights." May v. Anderson, 345 U.S. 528,533 (1953). However, both Armstrong v. Manzo, supra, and May v. Anderson, supra, concerned the rights of parents who had been married and subsequently divorced.

In Stanley v. Illinois, 405 U.S. 645 (1972), this Court broke new ground by extending constitutional recognition "to those family relationships unlegitimized by a marriage ceremony ", Id. at 651, and by holding

that unwed fathers are entitled, as a matter of due process, to a meaningful opportunity to be heard before their parental rights are effectively destroyed. The Court declared the unmarried father's interest in not being permanently separated from his children to be "cognizable and substantial," Id.at 652, and that the father, had to be proven unfit before such a deprivation could be imposed on him by

the state.*

*The majority opinion in Stanley, summarized the evolving constitutional recognition of familial rights over a period of fifty years:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential.' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L.Ed. 1042 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110,1113, 86 L.Ed. 1655 (1942), and '[r]ights far more precious...than property rights,' May v. Anderson, 345 U.S. 528, 533, 73 S. Ct. 840,843, 97 L.Ed. 1221 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438,442, 88 L.Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, 262 U.S. at 399, 43 S.Ct. at 626, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, 316 U.S. at 541, 62 S.Ct. at 1113, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965) (Goldberg, J., concurring).
>
> Id. at 651

Shortly after the Stanley decision the Court applied its ruling to an adoption case, Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972), summarily remanding "for further reconsideration in light of Stanley v. Illinois,..." an unwed father's claim that adoption of his child on the sole consent of the child's mother and without notice to him offended due process. See also, Miller v. Miller, 504 F. 2nd 1067 (9th Cir. 1974), striking down as unconstitutional an Oregon statute which permitted adoption without notice to the father of an illegitimate child, and State ex rel. Lewis v. Lutheran Social Services, 59 Wis. 2nd 1, 207 N.W. 2nd 826 (1973); People ex rel. Slawek v. Covenant Children's Home, 52 Ill. 2nd 20, 284 N.E. 2nd 291 (1972). But Cf., Department of Health and Rehabilitative Services v. Herzog, 317 So. 2nd 865 (Fla. Dist. Ct. App. 1975).

Since Stanley, supra, and Rothstein, supra, this Court has not retreated from but rather affirmed the principle that the relationship between an unwed father and his child is constitutionally protected, Quilloin v. Walcott, 434 U.S. 249 (1978); Little v. Streater, 452 U.S. 1 (1981) and that the familial interest protected is not only "substantial", Little v. Streater, supra, but "fundamental", Santosky v. Kramer, __U.S.__, 102 S.Ct. 1388, 71 L.Ed 2nd 599, 606 fn. 7 (1982).

Both Quilloin v. Walcott, supra, and Caban v. Mohammed, 441 U.S. 380 (1979) were concerned with the substantive standard required to extinguish the unwed father's parental interest in accordance with the mandates of due process and equal protection. The father's underlying constitutional interest was acknowledged and assumed. Moreover,

in each case the challenged adoption decision was made after the father had been afforded notice and a full adversarial hearing on the proposed adoption of his child. Quilloin v. Walcott, supra, at 250 n. 7, 253-254; Caban v. Mohammed, supra, at 384, 385 n.3.

Quilloin and Caban stand for the proposition that in the case of an unwed father, the absence of the marital bond itself, and the nature of the father's efforts to legitimate the child may be weighed, along with the father's involvement with the child and participation in its care and custody, in determining whether his parental rights may be terminated. A weighing of these elements may determine whether such a termination may be based only upon a showing that the father is "unfit," as in Stanley, and only on the same basis as is required to terminate the rights of the child's mother, as in Caban, or, whether the lesser standard of "best interest of the child" may be

sufficient, as in Quilloin.

Whatever the applicable substantive standard, Amici submit that an assessment of those factors cannot be made ex-parte. This Court's decisions are indisputable authority for the proposition that the parental rights of an unwed father, such as appellant, who has been identified formally or informally as such, cannot be terminated, as a matter of due process, without prior notice and an opportunity to be heard, Armstrong v. Manzo, 380 U.S. 545 (1965); Stanley v. Illinois, 405 U.S. 645 (1972); Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972).

Armstrong v. Manzo, Stanley and Rothstein were decided prior to Mathews v. Eldridge, 424 U.S. 319 (1976), where the court synthesized the factors to be applied in assessing proced-

ural due process claims.* Amici submit that an informed balancing of the Mathews v. Eldridge, 424 U.S. 319 (1976) factors compels the same result.

THE PRIVATE INTERESTS AT STAKE

The Putative Father's Interest

This Court's recognition of the rights of parents in relation to their children,be they legitimate or illegitimate, as fundamental constitutionally protected interests has already been summarized.

*"First, the private interest that will be affected by the official action; second,the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. at 335.

Because in this case the appellant is not a custodial parent, Amici wish to emphasize that, while custody is generally regarded as the central parental right, see Quilloin v. Walcott, supra, other aspects of parenthood are of comparable constitutional significance. Biological and emotional attachments have been identified as important attributes of the family relationship, Smith v. O.F.F.E.R., 431 U.S. 816 (1977). The rights of parents are also often described in terms of their usefulness to society, Wisconsin v. Yoder, 405 U.S. 205 (1972); Mills v. Halbluetzel __U.S.___, 102 S.Ct. 1549, 71 L.Ed 2d 770 (1982).

The sense of connectedness, belonging and responsibility, actual or potential, which parents feel toward their children is an inherent part of the parental relationship. It exists whether or not parent and child live together. The non-custodial parent's right to maintain a relationship with his child,

to have access to and contact with the child, to establish and preserve his identity as the child's father, remains one of the "intrinsic human rights" which the Constitution safeguards, Smith v. O.F.F.E.R., 431 U.S. 816, 845 (1977); Santosky v. Kramer, __U.S.___, 102 S.Ct. 1388, 71 L.Ed 2d 599 (1982). See also, Little v. Streater, 452 U.S. 1, 16 n. 12. (1981).*

This Court has recognized the severity of the deprivation imposed by termination of parental rights: termination does not merely infringe upon, but ends a natural parent's fundamental liberty interest. Santosky v. Kramer,

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*The importance of non-custodial parent-child relationship is reflected in the great value which New York courts have traditionally attached to the non-custodial parent's visitation rights, Chirumbolo v. Chirumbolo, 75 A.D. 2d 992,993, 429 N.Y.S. 2d 112, 114(4th Dept. 1980); Entwistle v. Entwistle, 61 A.D.2d 380, 402 N.Y.S.2d 213(2d Dept. 1978), app. dism., 44 N.Y.2d 851(1978); Raysor v. Stern, 68 A.D. 2d 786, 418 N.Y.S.2d 713(4th Dept. 1979).

__U.S.__, 102 S.Ct. 1388, 71 L.Ed.2d 599, 606, 610(1982); Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981).*

The majority opinion in Lassiter v. Department of Social Services, supra, characterized termination of parental rights as "a unique kind of deprivation", and concluded: "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." 452 U.S., at 27. The dissent characterized such a termination as "both total and irrevocable...leav(ing) the parent with no right to visit or communicate with the child, to participate in or even to know about, any important decision affecting the child's religious, educational, emotional or physical development." 452 U.S., at 39.

* The consequences of an adoption proceeding, which automatically cuts off the non-adopting parent's rights and obligations are obviously the same as those of termination. See, NYDRL §117; Caban v. Mohammed, supra, 384, n.2.

Although in the absence of a plenary hearing the evidence is sparse and the facts contested, appellant Lehr asserts that he tried to be an involved and responsible father to Jessica, that he tried to visit her, that he offered to contribute to her support, and undertook steps to be formally adjudged her father. He claims that, starting three days after Jessica's birth these attempts were thwarted by appellee Jessica's mother, who concealed her whereabouts from him for long periods of time and denied him visitation. The appellee mother, on the contrary, claims that appellant knew where she was and displayed little interest in the child.

Particularly in light of the paternity petition filed by appellant and the well-known ability of a custodial parent to manipulate a child's relationship to the non-custodial parent, see Pierce v. Yerkovich, 80 Misc. 2d 613, (Fam.Ct., Ulster Co. 1974), appellant's rights should not be devalued, ab initio.

The Child's Interest

The child's interest, supposedly the paramount one in an adoption proceeding, must also be considered.* The record in this case shows that in this ex-parte proceeding, no Law Guardian was ever appointed by the New York Courts to protect Jessica's interest. Compare Matter of Orlando F., 40 N.Y. 2d 103,112 (1976); N.Y. Fam. Ct. Act §249(a).

There was no inquiry here into any interest Jessica might have in her relationship to appellant Lehr, because in this proceeding he was treated as a non-person.

In Santosky v. Kramer,___ U.S.____ , 102 S.Ct. 1388, 71 L.Ed. 2d 599, 611 (1982), the Court reaffirmed that the interest of a child in the relationship with his or her

*Chief Justice Hallows, in State ex rel. Lewis, supra, made the point: "Blood is thicker than water. What has the child to say to all of this?" 17 Wis. 2d at 440, 178 N.W. 2d at at 66.

parent was a reciprocal one, and that, accordingly, until a legally sufficient basis for termination is proven in an adversarial hearing, "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." 102 S.Ct., at 1398, 71 L.Ed. 2d, at 611. Yet as a consequence of the adoption proceeding, Jessica, like Jed Santosky, was effectively foreclosed from ever knowing her natural father--an immeasurable loss. Santosky v. Kramer, 102 S.Ct. 1388, 71 L.Ed. 2d 611 n.11. In addition, adoption cuts a child off from a known religious, ethnic and cultural background, from potential inheritance sources of support, see Matter of Gerald G.G. 61 App Div 2d 521, 403 N.Y.S. 2d 57 (1978) appeal dismissed 46 N.Y. 2d 1036 (1979), and from extended family members. It is simply contrary to human nature to presume that a complete cutoff of a child from its natural father, by adoption, is always in the child's

interest.

The majority opinion of the Court of Appeals stated that "the petition and supporting papers contained no tender of evidence directly bearing on the best interests of Jessica." 54 N.Y. 2d at 430. However, as this Court said in Armstrong v. Manzo, 380 U.S. at 552:

> The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place. His motion should have been granted.

THE RISK OF ERRONEOUS DEPRIVATION

The high risk of erroneous deprivation of a father's precious rights, through an adoption order secured by a one-seded determination to him and with no opportunity to be heard, is obvious. This risk is heightened in this case by the fact that the records of the ex-

parte adoption proceeding are sealed, N.Y.Dom. Rel.Law § 114, and by the subjective nature of the underlying substantive determination: "best interest of the child".

When one side only can be heard, the risk of "substantive unfair or mistaken deprivations", Fuentes v. Shevin, 407 U.S. 67, 81 (1972), is obviously substantial. That is why notice and an opportunity to be heard are essential to the concept of fairness embodied in the Due Process clause of the Fourteenth Amendment. As Justice Frankfurter so eloquently stated in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172 (1952) at 170-172:

> "...[f]airness can rarely be obtained by secret, one-sided determinations of facts decisive of rights... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

The Family Court proceeding which appro-

ved the adoption of Jessica by her step-father did not take the existence, let alone, the interests of the appellant, her putative father, into account. Nor did it take into account the interplay of these interests with those of the child, Jessica. As the Court of Appeals noted, the pre-adoptive investigation, conducted pursuant to Dom.Rel.L. §116, concerned only the mother, the adoptive father and Jessica. Thus without the participation of appellant Lehr, the Family Court had no individualized basis to sever the relationship with his child. Nor could the Family Court properly determine whether legal severance of this relationship and the step-parent adoption supported or contradicted Jessica's best interests.

Certain common factual determinations are involved whether Mr. Lehr is considered to have the right to veto Jessica's adoption, unless his consent is dispensed with, pursuant

to Dom.Rel.L.§111, or, whether he is entitled to be heard only as the "best interest of the child" under Dom.Rel.L. § 111-a. See, Matter of Gerald G.G., 61 A.D. 2nd 521, 403 N.Y.S. 2nd 57, (2nd Dept.), appl. dism'd., 46 N.Y. 2d 1036 (1979), decided before Caban, and Matter of Adoption of Robin U., 106 Misc. 2nd 878, 435 N.Y.S. 2nd 659, decided after Caban which illustrate the multitude of considerations that can be brought to bear.

At the center of the conflicting contentions of Mr. Lehr and Mrs. Robertson is the question whether Mr. Lehr displayed the characteristics of an interested, concerned and loving father, but was thwarted by Mrs. Robertson's hostility and concealment of herself and Jessica, or, whether Mr. Lehr was irresponsible and showed no interest or concern for the child, although Mrs. Robertson gave him the opportunity to do so.

Thus, for a proper assessment of the con-

duct of Mr. Lehr and of Mrs. Robertson, and the interests of Jessica, evidence would be required, first of all, of Mr. Lehr's interest in fatherhood prior to Jessica's birth. For example, did either of them openly acknowledge that the child was theirs; did she in fact sign a written acknowledgement of his paternity; did they make preparations for the baby's birth together.

Further, evidence would be required on the subject of Mr. Lehr and Mrs. Robertson's behavior at the time of Jessica's birth. Was he a frequent or welcome visitor at the hospital; how was the child's name chosen and what were the circumstances surrounding the preparation of the birth certificate; what was the reason mother and child did not return to live with Mr. Lehr; did Mr. Lehr pay for any expenses of the delivery; did he buy clothes, toys and equipment for the child; did he contribute to the baby's support, or was he un-

able to do so.

Evidence would also be required on the precise whereabouts of Mrs. Robertson and Jessica between November, 1976 and December, 1978; how often did Mr. Lehr communicate with them during this time; how often did Mr. Lehr visit Jessica; did he want more visits or did Mrs. Robertson deny him visits; did Mr. Lehr show affection for Jessica and bring gifts for her; when did Mr. Lehr hire a detective agency to locate Mrs. Robertson.

On none of these or any of the other significant questions which are an integral part of the determination was there any evidence before the adoption court. Nor was there evidence before the adoption court as to whether Jessica knew that Mr. Lehr was her father, whether she had been told by him, by Mrs. Robertson or by her older step-sister, Renee.

Moreover, the adoption court did not

consider Mr. Lehr's character and temperament, see, Matter of Malpica-Orsini, supra, his physical and mental health, his religious and ethnic background, the involvement of Jessica's grandmother, Mrs. Lehr, and other members of his family and Jessica's prospects for inheritance from them.

Because Mr. Lehr was given no opportunity to be heard, the adoption court never considered whether, even if adoption by her stepfather, was otherwise in her best interest, the adoption should be qualified by visitation between Jessica and Mr. Lehr. As explained in Matter of Adoption of Anthony, 113 Misc. 2nd 26, 448 N.Y.S. 2nd 377 (Fam. Ct. Bx. Co. 1982) where visitation after adoption was ordered between the adoptive child and his siblings:

> "Research by psychiatrists and psychologists has also revealed the importance of a child's links to known ancestral, religious, ethnic

> and cultural backgrounds. Recent studies indicate that shrouding a child's background in an air of mystery, even for a child adopted at birth, can cause psychological harm, retarding emotional development and self-identity..."
> Id., at 379-380

The magnitude of the risk of error is further compounded by the nature of the underlying substantive standard: - "best interest of the child", which formed the basis for the ex-parte approval of Jessica's adoption. N.Y. Dom.Rel.L. §§114,116.

This Court has noted that the "best interest of the child" standard is vague, Smith v. O.F.F.E.R., 431 U.S. 816, 835, n. 36 (1977). The standard provides no clear basis for determining whether or not an adoption should be approved and is thus highly conducive to arbitrary decision making. Indeed, in Santosky v. Kramer, supra, the Court, citing to its observation in Smith v. O.F.F.E.R., held that where "imprecise substantive standards that

leave determinations unusually open to the subjective values of the judge", Id., at 71 L. Ed. 2nd 612, formed the basis for proceedings of termination of parental rights, the risk of erroneous factfinding was magnified.

It is self-evident that providing the appellant putative father with notice and an opportunity to be heard will decrease the risk of erroneous deprivation of his and his child fundamental interest in their parent-child relationship. When notice and an opportunity to be heard are provided, the question whether appellant Lehr has or has not "manifested a significant paternal interest in the child", Caban v. Mohammed, 440 U.S. 380, 394, as translated into an appropriate substantive standard, will become subject to individualized proof in place of the current presumption which ignores his existence and "forecloses the determinative issues of competence and care...", Stanley v. Illinois, supra, at 657.

THE STATE'S INTEREST

New York State's interest in limiting notice of adoption proceedings to the fathers of children born out of wedlock enumerated in N.Y.Dom. Rel. §111-a, is, as described by the New York Court of Appeals, to achieve finality in adoption as early as possible, and to avoid having to give notice to putative fathers who would not be "readily identifiable", Matter of Adoption of Jessica XX, 54 N.Y. 2nd, at 428-429.

However, on this appeal, Mr. Lehr does not seek a ruling that notice and an opportunity to be heard be provided putative fathers whose identity and whereabouts are unknown. Rather, he asserts, that the concept of "readily identifiable" father under Dom. Rel. L. §§ 111 and 111-a, is unfairly and unnecessarily restrictive if it excludes a putative father such as appellant, whose identify and whereabouts are known not only to the par-

ties, but to the adoption court.

Neither is the state's interest in achieving finality threatened by the provision of notice and hearing to putative fathers such as appellant. On the contrary, the state's interest in achieving finality in adoption is enhanced by the provision of notice to as many known putative fathers as possible. "Unwed fathers who do not promptly respond can not complain if their children..." are adopted. Stanley v. Illinois, supra, at 657, n. 9. Because adoptions affect constitutionally protected and widely valued personal rights the lack of notice and the opportunity to be heard will not necessarily conclude litigation and the finality of adoptions will continue to be illusory.*

*For a helpful discussion of the manner in which several states have dealt with notice to to unwed fathers, see Freeman, "Remodeling Adoption Statutes after Stanley v. Illinois", Journal of Family Law, Vol. 15, No. 3, p. 385, University of Louisville School of Law, 1976-77.

Moreover, the state always has a substantial interest in the fairness and accuracy of its own adjudications, Stone v. Powell, 428 U.S. 465 (1976); Parham v. J. R., 422 U.S. 584 (1979). Obviously the state spites this interest when it seeks to avoid having to provide the most rudimentary elements of procedural fairness: notice and the opportunity to be heard.

Providing notice and an opportunity to be heard to appellant Lehr would not involve any administrative burden. Other known and identifiable fathers in Lehr's situation for whom notice is not presently required by Dom. Rel. L. §111-a would not automatically come to the attention of the adoption court unless some administrative change were made. Even with such a change this slight administrative concern could be easily resolved by asking the child's mother to file an affidavit in the adoption proceeding stating whether either

currently or in the past she was a party to a paternity, custody support or other legal proceeding with the child's father, providing the details of home, time and place. Or, the mother can simply be requested, even if not necessarily compelled, to disclose the name and address of the father if she knows it.

In Amici's extensive experience, representing both mothers and fathers of children born out of wedlock, instances when a mother will refuse to provide this information are extremely rare.

While the state has the option of requiring that more names and addresses be placed in the putative father Registry than is presently provided for, such as the names of persons filing paternity petitions, the cost of enlarging the registry is not a necessary consequence of a decision in favor of the appellant.

WHAT PROCESS IS DUE

New York's failure pursuant to D.R.L. §§ 111, 111-a to porvide notice of the proposed adoption of his child and an opportunity to be heard to appellant and other known and identifiable fathers similarly situated violates "the most rudimentary demands of due process of law". Armstrong v. Manzo, 380 U.S., at 550. The fundamental nature of a natural father's interest in his relationship to his child, the severity of the loss caused to both by the severance of their relationship, the magnitude of the risk that a known and identifiable father's parental rights will be erroneously terminated on the basis of an ex-parte proceeding in which his interests are not even considered, the unquestionable value of providing notice and an hearing in preventing such a result, combined with the fact that the states interest in achieving finality in adoption will be enhanced by fair

and reliable procedures without any undue administrative burden, all make the conclusion that due process is violated inescapable.

"The fundamental requisite of due process of law is the opportunity to be heard," Goldberg v. Kelly, 397 U.S. 254, 267 (1970), quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914). And the "right to be heard has little reality or worth unless one is informed that the matter is pending and can chose for himself whether to appear or default, acquiesce or contest," Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950).

The consequence of the total denial of procedural protection to the appellant has been a complete denial of his parental rights without consideration of his actual individual parental concern. The substantive and procedural deprivation imposed on appellant is completely out of proportion to any substantial state interest. For no demonstrated

reason other than the principle of minimum effort the state has pursuant to D.R.L. §111 and §111-a shifted virtually the entire burden of protecting his rights to the putative father. This is a burden that many putative fathers are ill equipped to bear. Among the unmarried fathers who are their clients Amici have encountered complete ignorance of the putative father's Registry, and widespread ignorance of procedures for entering names on birth certificates or even the significance of paternity proceedings at all.

The availability of the putative father's Registry operating in virtual secrecy from the public cannot serve as a substitute or condition for the provision of basic due process guarantees. In Quilloin v. Walcott, supra, this court declined to rest its assessment of Mr. Quilloin's parental interest on his failure to bring a legitimation proceeding of which he was unaware. It would similarly be unfair to

penalize appellant and other putative fathers for their ignorance of the putative father's Registry.

> "Any system basing notice solely on a formal declaration, or acknowlegement by the father, ... is too rigid. Among poorly educated groups - and in matters of the law many people are in this category - there is a real danger that a formal prerequisite may work a serious and unnecessary injustice." Freeman, supra, at p. 410.

Nor can appellant be required to demonstrate that he would prevail, at trial, if notice and the opportunity to be heard in the adoption proceeding were provided to him. As this Court stated in Fuentes v. Shevin, 407 U.S. 67 (1972):

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 59 L.Ed. 2nd 1027, 1032, 35 S.Ct. 625. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods." Id., at 87

II

EQUAL PROTECTION OF THE LAWS IS VIOLATED BY NEW YORK STATUTES WHICH PROVIDE NOTICE AND OPPORTUNITY TO BE HEARD IN ADOPTION PROCEEDINGS TO PUTATIVE FATHERS WHO FILE ADMINISTRATIVELY A NOTICE OF INTENT TO CLAIM PATERNITY, BUT WHICH DENY IT TO A PUTATIVE FATHER WHO FILES A VERIFIED PETITION IN COURT DECLARING PATERNITY.

N.Y. Dom. Rel. Law §111-a, added in response to this Court's decision in Stanley v. Illinois, supra, sets forth seven categories of putative fathers statutorily entitled to notice of an adoption proceeding. Under subsection (a), of §111-a(2), appellant would have been entitled to such notice, had his paternity petition been adjudicated by the Family Court in Westchester County before the adoption was hastily finalized by the Family Court in Ulster County. However, counsel for the adoptive parents acted to foreclose that possibility by (1) obtaining a stay of the paternity action, as part of

an order to show cause why venue thereof should not be changed to Ulster County; and (2) bringing on the adoption matter, in the interim, without any notice to Mr. Lehr or his counsel.*

Under Subsection (c) of §111-a(2), appellant would have been entitled to notice of the adoption proceedings if he had filed an unrevoked notice of intent to claim paternity of the child. However, like most unwed fathers, he was unaware of the "Putative Father Registry."** See discussion p. 7 , supra.

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* (A. 82-86) "[A]ttorneys [ ] are officers of the Court and they are expected to advance the ends of justice," in adoption proceedings. In Re Walker, 87 A.D. 2d 555, 560, 448 N.Y.S.2d 474, 497 (1st Dept. March 23, 1982). The circumstances surrounding the entry of the adoption decree herein are relevant in assessing the fairness of the proceedings below.

** (A-56 n.8.) Mr. Lehr stated, in his petition to vacate the order of adoption, that "even had he been aware, he would have had no cause to register since Lorraine had always acknowledged openly, by her words and conduct, that your petitioner was Jessica's father." (Ibid). In Quilloin v. Walcott, 434 U.S. 246, 254 (1978), the Court stated: "We would hesitate to rest decision on this ground in light of the evidence in the record that appellant was not aware of the legitimation procedure until after the adoption petition was filed."

But, appellant did more than file administratively a notice of intent to claim paternity. He filed a verified petition in court declaring paternity. Instead of merely filling blanks on an agency form, he swore, under oath, that he is the father of the child, Jessica, and he sought judicial sanction imposing the rights and responsibilities flowing therefrom. Yet, the New York Court of Appeals majority opinion held that this significant step taken by appellant was insufficient to warrant his receiving notice and opportunity to be heard in the adoption proceeding.

In order to withstand scrutiny under the Equal Protection Clause, state "legislation [must] classify the persons it affects in a manner rationally related to legitimate governmental objections." * Schweiker v. Wilson, 450 U.S. 221, 230 (1981), quoted in Logan v. Zimmerman Brush Co., ___U.S.___, 102 S. Ct. 1148, 1159 (Feb. 24, 1982) (separate opinion of Justice Blackman). Accord, Lindsey v. Normet, 405 U.S. 56 (1972). "[T]he Equal Protection Clause imposes a requirement of some

*A higher level of scrutiny is in fact appropropriate in cases involving familial rights, Moore v. City of East Cleveland, 431 U.S. 494 (1977) and classifications must be justified by by at least a substantial state interest. Here however, even the rational basis test cannot be satisfied.

rationality in the nature of the class singled out. " James v. Strange, 407 U.S. 128, 140 (1972).

It is irrational to afford greater procedural protection -- notice and opportunity to be heard -- to a putative father who merely files an administrative notice of intent to claim paternity, than to one who actually files a verified petition in a court declaring paternity. From the standpoint of providing notice to the adoption court, the former father furnishes, at best, constructive notice of his claim to paternity, while the latter father (appellant herein) furnishes actual notice of his claim, under oath. As Chief Judge Cooke said, in dissenting below:

> "To say in the face of the actual knowledge of the Judge that petitioner could have protected his rights by filing a notice of intent to claim paternity is to require the performance of a meaningless act. The filing of notice only assures that knowledge of the father's existence can be readily ascertained. If it is already known by the court before the adoption order is signed, I am at a loss to discern what added benefit petitioner, or the State,

> could have obtained by filing such a notice."

54 N.Y.2d, at 434-35.

Moreover, from the standpoint of the putative father's demonstrated commitment, he who commences a judicial paternity proceeding would seem to evidence an interest, at least as great if not greater than, he who files only a notice of intent with an administrative agency. See, John J.S. v. Theresa L., 99 Misc.2d 578, 416 N.Y.S.2d 1000 (Fam. Ct. Bx. Co. 1979):

> "In the adoption proceeding the filing of an intent without the implementation of a paternity proceeding may evidence an abandonment of a putative father's intention or laches. By prompt commencement of a paternity proceeding, however, a putative father demonstrates an interest beyond mere intention."

416 N.Y.S.2d, at 1002.

It is clear that the New York statutes in question herein are lacking in rationality in the nature of the class singled out. "It follows that denying [notice and opportunity to be heard] to [Jonathan Lehr] and those like him while granting it to other [New York fathers,

under N.Y. Dom.Rel. Law §111-a(2)] is inescapably contrary to the Equal Protection Clause." Stanley v. Illinois, 405 U.S. at 658.

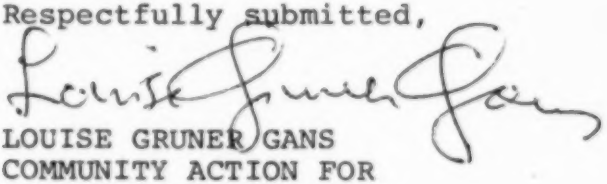
CONCLUSION

This Court need not reach the issue of Caban's applicability to the within adoption proceeding under the doctrine of Linkletter v. Walker, 381 U.S. 618 (1964). The issue to determined is one of notice and opportunity to be heard. Amici urge the Court to rule that appellant Lehr was entitled to notice and hearing prior to the proposed adoption of his daughter. The applicable substantive standard should in the first instance be determined by the New York courts, after resolution of factual questions which have to be resolved before appellant's substantive rights in this case can be determined.

The decision of the New York Court of

Appeals should be reversed and remanded for further proceedings.

Respectfully submitted,



LOUISE GRUNER GANS
COMMUNITY ACTION FOR
LEGAL SERVICES, INC.
335 Broadway
New York, New York 10013
(212) 431-7200

STANLEY A. BASS
QUEENS LEGAL SERVICES CORP.
29-28 41st Avenue
LONG ISLAND CITY, NEW YORK 11101
(212) 392-5646

GARY R. CONNOR
SHIRLEY STARK
BROOKLYN LEGAL SERVICES
CORP. "A"
260 Broadway
Brooklyn, New York 11211
(212) 782-6195

Attorneys for Amici Curiae

DSS-2723 (REV. 9/77)

NOTICE OF INTENT
TO CLAIM PATERNITY
OF CHILD BORN OUT-OF-WEDLOCK

CHILD'S NAME	
DATE ACKNOWLEDGEMENT SENT	FOR AGENCY USE

Date:

TO: Registrar
Putative Father Registry
New York State Department of Social Services
40 North Pearl Street
Albany, New York 12243

This is to advise you that I intend to claim paternity and to have my name filed with the Registry as the father of:

CHILD'S NAME (Print or Type)	DATE OF BIRTH
CHILD'S PLACE OF BIRTH	
MOTHER'S NAME	

I understand that I must keep the Registry informed about any change of address. I understand that pursuant to Section 372c of the Social Service Law that this notice of intent to claim paternity may be revoked at any time and reserve my right to such revocation.

FATHER'S NAME (Print or Type)	
ADDRESS _____ _____	
FATHER'S SIGNATURE	
	DATE SIGNED

Docket Sheet

NO.	TITLE
81-1756-ASX	Jonathan LEHR, Appellant v. Lorraine Robertson, et al.

DOCKETED	COURT
Mar. 22, 1982	Court of Appeals of New York

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: David J. Freeman
	Counsel for Appellees: Jay L. Samoff, Robert J. Schack
Feb. 9, 1982	Application for an extension of time to file petition for certiorari and/or docket an appeal and order granting same until March 22, 1982 by Marshall, J, on Feb. 10, 1982.
Mar. 22, 1982	Statement as to jurisdiction filed. (Record filed)
Mar. 22, 1982	Appendix filed.
Apr. 1, 1982	Motion to dismiss or affirm filed by appellees Lorraine Robertson and Richard N. Robertson, Jr.
Apr. 21, 1982	DISTRIBUTED. 5-13.
May 17, 1982	Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

May 27, 1982	Order extending time to file the joint appendix and Appellant's brief on the merits until July 31, 1982.
May 28, 1982	Order extending time for all appellees to file their briefs on the merits until Sept. 15, 1982.
July 8, 1982	Order further extending time to file the joint appendix and appellant's brief on the merits until Aug. 15, 1982
Aug. 17, 1982	Motion of Community Action for Legal Services, Inc., et al. for leave to file a brief as amici curiae filed.
Aug. 18, 1982	Joint appendix for appellant filed.
Aug. 18, 1982	Appellant's brief filed.
Sept. 14, 1982	Brief for the appellees Robertson filed.
Sept. 15, 1982	Motion of The National Committee for Adoption, Inc., for leave to file a brief as amicus curiae filed.
Sept. 18, 1982	Brief for appellee Attorney General of the State of New York filed.
Oct. 4, 1982	The motion of Community Action for Legal Services, Inc., et al. for leave to file a brief as amici curiae is GRANTED. The motion of National Committee for Adoption, Inc. for leave to file a brief as amicus curiae is GRANTED.
Oct. 13, 1982	CIRCULATED.
	(Over)

81-1756

Title

No.

DATE	PROCEEDINGS AND ORDERS
Oct. 27, 1982	Motion of Attorney General of New York for leave to file out of time motion for divided argument filed.
Nov. 5, 1982	The motion of New York for leave to file an out-of-time motion for divided argument is DENIED.
Nov. 30, 1982	Reply brief for the appellant filed. (D).
Dec. 7, 1982	ARGUED.